3 Otto 174

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~278.~~ 77

THE PLANTERS' NATIONAL BANK OF LOUISVILLE, PLAINTIFF IN ERROR,

vs.

THE ADAMS EXPRESS COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED SEPTEMBER 29, 1874.

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SUPREME COURT OF THE UNITED STATES.

No. 273.

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vs.

THE ADAMS EXPRESS COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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a UNITED STATES OF AMERICA,
District of Kentucky, ss:

The President of the United States of America to the judge of the circuit court of the United States for the Kentucky district, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between the Planters' National Bank of Louisville, plaintiffs, and The Adams Express Company, a manifest error hath happened, to the great damage of the said Planters' National Bank of Louisville, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the first day of our next October term in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and the seal of said court, at Louisville, in said district, this seventh day of August, A. D. 1874, and of the Independence of the United States the ninety-ninth.

W. A. MERIWETHER,
C. C. C., K. D.

Allowed by—

BLAND BALLARD.

(Indorsed:) Planters' National Bank vs. Adams Express Co. Writ of error.

b UNITED STATES OF AMERICA,
District of Kentucky, ss:

To the Adams Express Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at Washington, in District of Columbia, on the 1st Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the said district of Kentucky, wherein the Planters' National Bank of Louisville is plaintiff, and you are defendant, in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this seventh day of August, in the year of our Lord, 1874, and of our Independence the ninety-ninth.

[SEAL.] BLAND BALLARD.

(Indorsed:) 1698. Planters' Nat. Bank vs. Adams Express Co. Citation & copy. 87.

Executed by delivering to Vol. Rose, the agent, superintendant, and manage' of Adams Express Company at this place, a copy of this citation, this 10th August, 1874. Marshal's fee, $2.

E. H. MURRAY, *U. S. M.*
By HENRY DIVER, *D. M.*

1 Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term begun and held at the Federal Court Hall, in the city of Louisville, on Monday, February 16th, 1874.

Present, the honorable Bland Ballard, judge of the United States for the district of Kentucky.

PLANTERS' NATIONAL BANK
vs.
ADAMS EXPRESS CO.

Be it remembered that heretofore, to wit, at a term of our said court, held for its February term, 1870, to wit, on Friday, February 4th, 1870, came the defendant, by Isaac Caldwell, its attorney, and filed copies of process and other proceedings had in said case in the Jefferson court of common pleas in the State of Kentucky.

And thereupon said defendant, by its said attorney, entered its appearance herein.

On motion of the defendant, by its said attorney, it is ordered that the clerk do place said case upon the docket of this court, and that it be tried here in its regular order.

The copies of process and proceedings above referred to are as follows:

STATE OF KENTUCKY,
Jefferson Court of Common Pleas:

2 Pleas before the honorable Henry J. Stiles, sole judge of the coort aforesaid, held at the court-house, in the city of Louisville, on the 13th day of Nov., 1869.

PLANTERS' NATIONAL BANK
vs.
ADAMS EXPRESS COMPANY.

Be it remembered that heretofore, to wit, on the 29th day of September, 1869, come plaintiff, by attorney, and filed his petition herein, which is as follows, to wit:

Plff. petition.

Court of common pleas for Jefferson County.

PLANTERS' NATIONAL BANK OF LOUISVILLE,
plff.,
vs.
THE ADAMS EXPRESS COMPANY, DEFT.,

The plaintiff, the Planters' National Bank of Louisville, states that it is a banking association duly and legally organized under and in accordence with the various act' of the Congress of the United States which authorize the formation of such associations, and has been duly
3 and legally authorized to engage in a general banking business.

The plaintiff further states that on the 26th day of July, 1869, one sealed package, containing three thousand dollars in the currency of the United States, addressed to plaintiff at Louisville, Kentucky, the

same being the property of plaintiffs, was by the Louisiana National Bank, located at New Orleans, delivered at New Orleans to the Southern Express Company, a common carrier of money and other property, to be shipped and forwarded from New Orleans to the plaintiffs at Louisville, Kentucky. And the said Southern Express Company, in consideration of the usual compensation for such services, agreed to be paid upon the delivery of said package to plaintiffs at said city of Louisville, received and agreed and undertook to ship and forward the same to plaintiffs and to deliver, or cause said package to be delivered, at Louisville, and said company did ship and start said package to plaintiffs at said city.

Plaintiffs further state that, in the course of the transportation of said package from New Orleans to Louisville, the same came into the possession of the defendant, by its agent and servant, and said defendent undertook and agreed, in consideration of the compensation
4 aforesaid, which defendant was authorized to collect and retain to the extent of its charges for completing the transportation and the delivery of said package to plff. at Louisville, to complete the transportation thereof, and to deliver same at Louisville to plaintiff.

Plaintiff further says that the defendant was, when it received said package, by its agent and servant, for the purpose of completing the transportation and making delivery to plff., and has been ever since, a common carrier of money and other property, doing business under name and style of the Adams Express Company. Plaintiff further state' that, although a reasonable time for the transportation and delivery of said package to it by defendant has elapsed, and although plaintiff has duly demanded the delivery thereof by defendant, and did so demand the same in writing, stating the nature of the demand, prior to the 25th of August, 1869, and tendered and offered to pay to defendant the customary and agreed compensation for the transportation and delivery of said package to defendant, has wholly failed and refused and still fails and refuses to deliver the same, containing said money or currency of the United States and property of plaintiffs.

5 Wherefore plaintiff, reserving all the rights it may have against the Southern Express Company and all others, prays for a judgment against defendant for the sum of three thousand dollars, with interest thereon from July 27, 1869, and for all other and proper relief.

HARLAN AND NEWMAN, *for Plff.*

Affidavit of J. M. Duncan.

James M. Duncan says that he is president of the Planters' National Bank of Louisville, and that the statement of the foregoing petition he believes to be true.

JAMES M. DUNCAN.

Notary public' certificate.

Sworn to before me by James M. Duncan this Sept. 28, 1869.

J. W. BATCHELOR,
N. P., Jefferson Co., Ky.

Sheriff's return on summons.

The following is the sheriff's return on summons which issued on the foregoing petition, to wit:

Executed by delivering a true copy of the within summons to Vol. Rose, local agent of the Adams Express Company, Sept. 30, 1869.

C. W. FIELD, JR.,
D. S. for J. M. Martin, S. J. C.

6 *Summons.*

The Commonwealth of Kentucky to the sheriff of Jefferson Co., greeting:

You are commanded to summon Adams Express Company to answer a petition filed against them in the Jefferson court of common pleas by Planters' National Bank of Louisville, Ky., and warn them that upon their failure to answer within twenty days from the service hereof the petition will be taken for confessed, or they will be proceeded against for contempt; and you will make due return of this summons as soon as executed.

Witness John S. Cain, clerk of said court, this 29th day of September, 1869.

JOHN S. CAIN, *Clerk.*

Sheriff's return.

Executed by delivery a true copy of the within summons to Vol. Rose, local agent of the Adams Express Company, Sept. 30th, 1869.

C. W. FIELD, JR.,
D. S. for J. M. Martin, S. J. C.

Order filing defendant' petition and approving bond.

And at a court continued and held as aforesaid on the 13th day of November, 1869:

This day came the parties, by their attorneys, and the defendant filed a petition herein, and tendered to the court a bond, with W. C. Hite as surety, which bond, being approved by the court, is ordered to be filed, and defendant moved the court to transfer these causes to the
7 United States circuit court for the district of Kentucky; said m - tion being heard, and the court being advised, ordered the same to be sustained.

It is therefore ordered that the clerk of this court make out a full, true, and complete transcript of the papers, together with all the orders herein, to be delivered to the defendant, and by the defendant taken to the United States circuit court for the district of Kentucky, which petition is as follows, to wit:

Deft.' petition.

The defendant, The Adams Express Company, states that the plaintiff The Planters' Nat'l Bank of Louisville, is a corporation located and having its office and place of business in the city of Louisville, in the State of Kentucky, and is a citizen of Kentucky, the State in which this suit is brought; and the defendant further states that the Adams Express Company is a joint-stock association, consisting of more than seven shareholders or associat*ions* created by lawful contract and articles of association duly signed and executed in the State of New York, one of the States of the United States of America, and having its chief office and place of business in the city of New York, in the last-named State, and said Adams Express Company is a citizen of said State of New York, another State of the United States of America, and different from the State of Kentucky, in which this suit is brought;
8 and the *different* states that all of the associates or shareholders constituting the said Adams Express Company are citizens of other States of the United States of America, and none of them are

citizens of, nor is any one of them a citizen of, the State of Kentucky, in which this suit is brought; and the defendant further states that the matter in dispute this suit exceeds the sum or value of five hundred dollars, exclusive of costs, as is made to appear unto this court on the face of plaintiff's petition; and the said defendant, the Adams Express Company, now, at the time of entering its appearance in this honorable court, hereby petitions this honorable court for removal of this case for trial unto the next circuit court of the United States of America to be held in the district of Kentucky.

THE ADAMS EXPRESS COMPANY,
By I. & J. CALDWELL, *Atty. for Deft.*

Affidavit of S. A. Jones.

STATE OF KENTUCKY,
Jefferson County:

Samuel A. Jones states that he is chief agent in this State for the Adams Express Company; that all the officers, associates, and stockholders of said company are now absent from this county and are non-residents of Kentucky, and that he believes all the statements
9 made in the foregoing petition are true.

S. A. JONES.

Notary's certificate.

Sworn to by Saml. A. Jones this 13th day of November, 1869, before me.

JUNIUS CALDWELL, *N. P. J. C.*

The bond referred to in the foregoing order is as follows, to wit:

Bond.

Know all men by these presents that we, The Adams Express Company, principal, and W. C. Hite, as surety, are held and firmly bound unto The Planters' National Bank of Louisville in the penal sum of one thousand dollars, payment whereof to be made we bind ourselves, our heirs, executors, and successors forever. Witness o'r hands and seals the 13th day of November, 1869.

The conditions of this bond are such that whereas in the action now pending in the above-entitled court wherein the above-named Planters' National Bank is plaintiff and The Adams Express Co. is defendant, the defendant has this day presented and filed its petition in the said above-entitled court for a removal of the said above-described cause for trial in the next circuit court for the United States of America to be held in the district of Kentucky, and offered the said William C. Hite as surety, who is accepted and approved by the court as good and sufficient.

Now, if the said defendant shall enter in said circuit court for the United States of America, in the district of Kentucky, on the
10 first day of its next session, copies of said process against it, and if it shall also then appear there in said court then the above obligation to be null and void; otherwise to remain in full force and virtue.

ADAMS EXPRESS COMPANY.
S. A. JONES.
W. C. HITE.

Atty., JOHN C. LORAN, *D. C.*

STATE OF KENTUCKY,
Jefferson County:

I, John S. Cain, clerk of the Jefferson common pleas court, in and for the State and county aforesaid, hereby certify that the foregoing 13 pages, this included, contain a full, true, and complete transcript of the record and proceeding in the case herein mentioned.

In testimony whereof I have hereunto set my hand this 1st day of Dec., 1869.

JNO. S. CAIN, *Clerk.*

And on another day of our said term of our said court, to wit, on Saturday, March 19, 1870, came the plaintiffs, by Jno. E. Newman, their attorney, and filed their declaration and exhibit therein re-
11 ferred to; which said declaration above referred to is as follows, to wit:

In the circuit court of the United States, sixth circuit and Kentucky district, February term, March 19th, 1870.

The Planters' National Bank of Louisville, an association for carrying on the business of banking in that name, created and duly organized and located in the city of Louisville, county of Jefferson, and State of Kentucky, under and by virtue of the laws of the United States in such case made and provided, comes by its attorneys, Harlan, Newman and Bristow, and states to the court that heretofore, to wit, on the 29th day of September, A. D. 1860, it exhibited and filed in the Jefferson court of common pleas of the State of Kentucky, an ordinary petition, praying judgment upon the matter and things hereafter stated and complained of against Adams Express Company, a joint-stock association created and duly organized by the laws of the State of New York, under the name of the Adams Express Company, having its chief office and place of business in the city of New York, of which State of New York said defendant was and is a citizen. And thereupon, afterwards, to wit, on the 13th day of November, A. D. 1869, at the city of Louisville aforesaid, on the petition and motion of said defendant said action was re-
12 moved by order of said Jefferson court of common pleas to this honorable court for trial, as by the statute made and provided, and as required by rules of this court. The said Planter's National Bank of Louisville, by its said attorneys, now comes and complains of the said Adams Express Company of a plea of trespass on the case.

1 COURT.—For that whereas the said defendant, before and at the time of the delivery of goods, chattels, and money to said defendant as hereinafter next mentioned, was, and thence hitherto hath been, and still is, a common carrier as aforesaid, to wit, on the 26th day July, A. D. 1869, at a town in the State of Tennessee, to wit, Humbolt, in the State of Tennessee, to wit, at the district aforesaid, at the special interest and request of the said defendant caused to be delivered to the said defendant a package containing United States Treasury notes and national-bank notes of great value, to wit, of the value of three thousand dollars, belonging to plaintiff, to be taken care and safely and securety carried and conveyed by said defendant to the city of Louisville, in the State of Kentucky, and then, to wit, at the city of Louisville aforesaid, to be safely and securely delivered by said defendant to and for the said plaintiff; and the plaintiff avers that although the said defendant then and there accepted and had and received the said package and its contents for the purpose aforesaid, and undertook the carriage, conveyence, and

13 delivery thereof as aforesaid, for certain reasonable reward in that behalf, and although a reasonable time for the carriage, conveyence, and delivery thereof as aforesaid has long since elapsed, yet the said defendant, not regarding their duty in that behalf, but intending to deceive and defraud the said plaintiff in this respect, did not nor would in such reasonable time as aforesaid, or at any time afterwards, although often requested so to do, take care of or safely or securely carry or convey the said package and its contents aforesaid to the said city of Louisville, nor them, to wit, at Louisville aforesaid, safely or securely deliver the same for and to said plaintiff, but has hitherto wholly neglected and refused so to do, and by means of the carelessness, negligence, and improper conduct of the said defendant and their agents in that behalf the said package and its contents aforesaid has not been delivered for or to the said plaintiff at the city of Louisville or elsewhere, and are wholly lost to the said plaintiff, to wit, at the district aforesaid.

2ND COURT.—And whereas also, heretofore, to wit, on the 26th day of July, A. D. 1869, at the city of New Orleans, in the State of Louisiana, a certain Southern Express Company, before and at the *the* time of delivery of the goods and chattels and money to them as hereinafter next mentioned, was, and from thenceforth hitherto has been, a common carrier of goods, chattles, and money for hire. And whereas also whilst

14 said Southern Express Company was such common carrier as aforesaid, to wit, on the day and year last aforesaid, at the city of New Orleans, in the State of Louisiana, the said plaintiff caused to be delivered to the said Southern Express Company, and that the said Southern Express Company then and there accepted and received of and from the Louisiana National Bank, a certain other package containing other United States Treasury notes and national-bank notes of great value, to wit, of the value of three thousand dollars, belonging to the plaintiff, to be safely and securely carried and conveyed by the said Southern Express Company from the city of New Orleans aforesaid to the agent of said Southern Express Company nearest or most convenient to the city of Louisville, in the State of Kentucky, to wit, to its agent at the town of Humbolt, in the State of Tennessee, and then and there deliver the said package and its contents aforesaid to some other parties, to wit, to the defendant, The Adams Express Company, to complete the transportation thereof to its destination, to wit, to the city of Louisville, in the State of Kentucky, and there, to wit, in the city of Louisville aforesaid, safely and securely deliver to the said plaintiff for certain reasonable reward in that behalf. And the plaintiff avers that at the time of delivery of said package and its contents aforesaid, to wit, on the day and year last aforesaid, the said Southern Express Company executed and delivered to the said Louisiana National Bank a paper purporting to be a receipt or domestic bill of lading, in large written letters and words, acknowledging the receipt of one package sealed and said to contain three thousand dollars, addressed to the said plaintiff, at Louisville, Kentucky, but in small type and closely printed words the following terms and conditions were inserted, to wit: "Upon the special acceptance and agree-

15 ment that the company is to forward the same to its agent nearest or most convenient to destination only, and there to deliver the same to other parties to complete the transportation, such delivery to terminate all liability of this company for such package, and also that this company are not to be liable in any manner or to any extent for any loss, damage, or detention of such package, or of its contents or of any portion thereof, occasioned by the acts of God, or by any person or persons acting or claiming to act in any military or capacity in hostility

to the Gover'ment of the United States, or occasioned by civil or military authority, or by the acts of any armed or other mob or riotous assemblage, piracy, or the dangers incident to a time of war, nor when occasioned by the damage of railroad transportation, or ocean or river navigation or by fire or steam. The shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and inure to the benefit of each and every company or person to whom the Southern Express Company may intrust or deliver the above-described property for transportation and shall define and limit the liability therefor of such other company or person. In no event is this company to be liable for a greater sum than that above mentioned, nor shall it be liable for any such loss unless the claim therefor shall be made in writing, at this office, within thirty days from this date, in a statement to which this receipt shall be annexed."

And the plaintiff further avers that afterwards, to wit, on the 27th day of July, A. D. 1869, the said Southern Express Company did transport and carry said package safely and securely from the said city of New Orleans to a town in the State of Tennessee, to wit, the town of Humbolt, and then and there did deliver said package and its contents to the defendant, The Adams Express Company, to
16 complete the transportation to the city of Louisville, and the said defendant before and at the time of the delivery of said package and its contents was and from thence hitherto has been and still is a common carrier of goods, chattels, and money for hire, and the said defendant, the Adams Express Company, then and there accepted and received said package and its contents last mentioned, belonging to the plaintiff, and of the value aforesaid, to wit, of the value of $3,000, to be safely and securely carried and conveyed by the said defendant, from the said town in the State of Tennessee, to wit, the town of Humbolt, to the city of Louisville, aforesaid, and then and there, to wit, at the city of Louisville, aforesaid, safely and securely to be delivered to and for the said plaintiff, for certain reasonable reward to the said defendant in that behalf, to be paid by the said plaintiff; yet the said defendant, not regarding their duty in that behalf, but intending to deceive and defraud the plaintiff in this respect, did not and would not deliver said last-mentioned package and its contents to the said plaintiff, but so negligently, carelessly, and improperly conduc ted themselves in that behalf that for want of due care in said defendants, and their agents and servants in that behalf, the said last-mentioned package and its contents afterwards, to wit, on the day and year last aforesaid, became and was destroyed by fire, and lost to the said plaintiff, and the plaintiff avers that the said fire and the destruction and loss of said last-mentioned package and its contents occasioned thereby were caused by the negligence and want of due care of the said defendant and their agents and servants in that behalf, and was not occasioned by the act of God, nor by any person or persons acting or claiming to act in
17 any military or other capacity in hostility to the Gover'ment of the United States, nor occasioned by civil or military authority, or by the act of any armed or other mob or riotous assemblage, piracy, or danger incident to a time of war, nor occasioned by the danger of railroad transportation nor ocean or river navagation, nor by steam. And the plaintiff further avers, that afterwards, to wit, on the 24th day of August, A. D. 1869, and within thirty days from the date of said receipt, the said plaintiff, at the office of the Southern Express Company, in the city of New Orleans, in the State of Louisiana, and also, to wit, on the 20th day of August, A. D. 1869, and within thirty days from the

date of the receipt aforesaid, the said plaintiff, at the office of the Adams Express Company, in the city of Louisville, in the State of Kentucky, made a claim for said loss in writing, in a statement to which the aforesaid receipt was annexed.

3RD COUNT.—And whereas also, afterwards, to wit, on the day and year aforesaid, at the circuit and district aforesaid, the said defendant, at the special instance and request of said defendant, had the care and custody of a certain other sealed package, containing other United States Treasury notes and national bank , belonging to plaintiff, of great value, to wit, of the value of $3,000. Yet the said defendant, not regarding their duty in that behalf, did not nor would, whilst they so had the care and custody of said last-mentioned package and its contents aforesaid, take due and proper care of the same or any part thereof, but wholly neglected so to do, and took such bad care thereof that afterwards, to wit, on the day and year aforesaid the said last-
18 mentioned package and its contents aforesaid became and were wholly lost to the said plaintiff, to wit, at the circuit and district aforesaid, to the damage of plaintiff $5,000, and therefore said plaintiff brings this suit, &c.

HARLAN, NEWMAN AND BRISTOW,
Attorneys.

And at another term of our said court, held for its February term, A. D. 1871, to wit, Saturday, March 18th, 1871, came the defendant, by Isaac Caldwell, its attorney, and filed its plea herein, which said plea above referred to is as follows:

Plea.

United States circuit court, sixth circuit and Kentucky district.

THE PLANTERS' NATIONAL BANK OF LOUISVILLE
against
THE ADAMS EXPRESS COMPANY.

And the said defendant, by I. & J. Caldwell, its attorney, comes and defends the wrong and injury, when, &c., and for plea says that the plaintiff ought not to have or maintain its aforesaid action against the said defendant, because the defendant says that by the express terms and stipulations of the within contract in plaintiff's declaration mentioned and described, it was contracted and agreed that the Southern Express Company was not to be liable in any manner or to
19 any extent for any loss or damage of the package and its contents in said contract mentioned when occasioned by the dangers of railroad transportation, or by fire, and defendant alleges that whilst said package and contents were being carried with due diligence, and according to the terms of the contract, and whilst it yet remained in the lawful custody and control of the agent and servant of said Southern Express Company, and was being so carried under said written contract, and not otherwise, the said package and its contents, without fault, neglect, carelessness, or other wrong of said Southern Express Company, or of defendant, it or their agent or servant, was totally lost and destroyed by fire arising and caused by the dangers of railroad transportation. And this the said defendant is ready to verify, wherefore the defendant prays judgement if the said plaintiff ought to have or maintain its aforesaid action thereof against defendant &c.

I. & J. CALDWELL, *P. D.*

On another day of our said term of our said court, to wit, on Monday, March 20th, 1871, came the plaintiff, by Burr & Goodloe, its attorneys, and filed a demurrer to the defendant's plea herein. The said demurrer above referred to is as follows:

United States circuit court, Kentucky district, ss:

PLANTERS' NATIONAL BANK
vs.
ADAMS EXPRESS COMPANY.

And the said plaintiff, as to the plea of this defendants by them above *above* pleaded, say that the same and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the said plaintiff from having or maintaining his aforesaid action thereof against the said defendant, and that he, the said plaintiff, is not bound by law to answer the same; and this the said plaintiff is ready to verify, wherefore, &c.

HARLAN & NEWMAN, *P. Q.*

And at another term of our said court, held for its May term, A. D. 1871, to wit, on Thursday, May 11, 1871, came the plaintiff, by Harlan and Newman, its attorneys; came also the defendants, by I. and J. Caldwell, its attorneys.

The defendant, by its said attorney, by leave of the court, withdrew from the files of the court the plea heretofore filed herein, and thereupon filed their plea of not guilty, and the plaintiff, by its attorneys, its joinder in said plea.

And by consent of said parties, the plaintiff in replication to said plea, and the defendant in defense of said action, may introduce in evidence any matter which might be specially pleaded or applied, and to have the same effect as if the same were specially set forth by plea, replication, &c.

21 And thereupon said parties filed their written agreement herein, which is as follows:

It is hereby agreed, as allowed by the provisions of the 4th section of the act of Congress of the United States approved March 3rd, 1865, that the issues in this case may be tried by the court without the intervention of a jury.

HARLAN AND NEWMAN,
For Plffs.
I. AND J. CALDWELL,
Atty. for Deft.

In pursuence thereto it is ordered that the issues in this case *to* be tried by court without the intervention of a jury.

The said plea above referred to is as follows:

United States circuit court, sixth circuit and Kentucky district.

THE PLANTERS' NATIONAL BANK *Bank* OF Louisville, plaintiff,
against
THE ADAMS EXPRESS COMPANY, DEFENDANT.

And the said defendant, by I. and J. Caldwell, its attorneys, comes and defends the wrong and injury, when, &c., and for plea says that the

plaintiff ought not to have or maintain its aforesaid action against the defendant, because the said defendant says it is not guilty of the said severel breaches, wrongs, and injuries in the severel counts of plaintiffs declaration alleged or any or either of them; and of this the defendant puts itself upon the country; wherefor', &c.

I. AND J. CALDWELL,
Attys. for Defts.

And the plff. doth likewise.

HARLAN & NEWMAN, *P. Q.*

22 And at another term of our said court, held for its February , A. D. 1874, to wit, on Tuesday, February 17th, 1874, come the parties, by their attorney, and by consent, it is ordered that the order entered in the foregoing case submitting the issues of fact to the court for decision without the intervention of a jury be and the same is hereby set aside.

And on another day of our said term of our said court, to wit, on Wednesday, July 15, 1874, come the plaintiff, by J. K. Goodloe and John M. Harlan, its attorneys; came also the defendant, by Isaac Caldwell, and G. C. Wharton, its attorneys.

And thereupon came a jury, to wit, E. B. Nugent, W. C. Kennedy, James Deally, A. C. Lewis, J. M. Gordon, H. N. Goose, and Wm. Kendrick, who were, by consent of the plaintiff and defendant, elected, tried, and sworn well and truly to try the issue joined.

The jury heard the evidence and arguments of the counsel, and the instruction and charges of the court having been delivered, the jury retired to consider their verdict and returned into court the following verdict, to wit:

"We, of the jury, find for defendant.

"WM. KENDRICK,
"*Foreman.*"

23 It is therefore considered by the court that the plaintiff, The Planters' National Bank, take nothing by its writ, and that the defendant, the Adams Express Company, go hence without day and recover of the plaintiff its costs herein expended.

The plaintiff, by its attorneys, tendered its bill of exceptions No. 1, which is signed and sealed by the court and ordered to be entered of record, which is as follows:

Plffs.' bill of exception No. 1.

Circuit court of the United States, Kentucky district.

PLANTERS' NATIONAL BANK, LOUISVILLE, PLAINTIFF,
vs.
ADAMS EXPRESS COMPANY, DEFENDANT.

Be it remembered that upon the trial of this case before the court and jury evidence was introduced before the jury tending to show that the Southern and Adams Express Companies, during the month of July, 1869, and before and since, were publicly engaged in the business of carrying money, currency, bank-notes, goods, and personal property for

hire, from one place to another; that the Southern Express Company and the Adams Express Company were engaged at that time in the carrying of money and other articles over the railroads, owned and operated by other persons and corporations, through Louisiana and Mississippi, to Humbolt, Tenn., and thence over the Louisville and Nashville Railroad to Louisville, under a contract by which they divided the compensation, having relation to the distance the article transported
24 by each company, and that between Humbolt, Tenn., and Louisville, Ky., both companies employed the same messenger or agent.

Evidence was also introduced before the jury tending to show that the plaintiff wrote to the Louisiana National Bank at New Orleans, directing the latter to send to it by express the balance due plaintiff; that the cashier, having read the letter, directed the paying-teller of said Louisiana National Bank to comply with said order; that the said Louisiana National Bank had in its possession blank bills of lading then used by the Southern Express Company, showing conditions and exceptions upon which the company would transport express-matter, and in the margin of such bills was a blank showing that said company would insure against all loss except that occasioned by the public enemy; that said Southern Express Company was in the habit of charging from New Orleans to Louisville one price when they undertook to ensure the safe delivery of articles intrusted to them against all losses except that occasioned by the public enemy, and that they charged a less rate when they transported upon the conditions set forth in the body of said bills of lading.

The evidence before the jury tendered to show that the Louisiana National Bank was aware of this regulation of the express co., and that, with said blanks in its possession, the paying-teller of said bank filled up the blank in one of them with these words and figures:

"$3,000.00."

25 "JULY 26," "9."

"Lou. National Bank." "One package." "Three thousand dollars." "Planters' Nat'l Bank, Louisville, Ky." "Coll."

Which bill of lading thus filled up was as follows, including the blank on the end thereof, viz:

"*Domestic bill of lading.*

"SOUTHERN EXPRESS COMPANY—EXPRESS-FORWARDERS.

"No. 2. $3,000.00. JULY 26TH, 1869.

"Received from Louisiana Nat'l Bank one package, sealed, and said to contain three thousand dolls., addressed Planters' Nat'l Bank, Louisville, Ky., upon the special acceptance and agreement that this company is to forward the same to its agent nearest or most convenient to destination only, and then to deliver the same to other parties to complete the transportation; such delivery to terminate all liability of this company for such package; and also that this company are not to be liable in any manner or to any extent for any loss, damage, or detention of such package or of its contents or of any portion thereof occasioned by the acts of God, or by any person or persons acting or claiming to act in any military or other capacity in hostility to the Government of the United States, or occasioned by civil or military authority, or by the acts of any armed or other mob or riotous assemblage, piracy, or the dangers incident to a time of war, nor when occasioned by the dangers of

26 railroad transportation or ocean or river navigation or by fire or steam.

"The shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and inure to the benefit of each and every company or person to whom the Southern Express Company may intrust or deliver the above-described property for transportation, and shall define and limit the liability therefor of such other company or person. In no event is this company to be liable for a greater sum than the above mentioned, nor shall it be liable for any such loss unless the claim therefor shall be made in writing, at this office, within thirty days from this date, in a statement to which this receipt shall be annexed.

"For the company. "SHACKELFORD.

"Freight coll.

"Insured by Southern Express Company for to only, except against loss occasioned by the public enemy. Insurence $ For the company."

The bill of lading thus filled was presented to the Southern Express Company at New Orleans by the said paying-teller, and was signed by its agent, Shackelford, as appears therein, and was by him, July 26th, 1869, delivered to said paying-teller, who at the same time delivered to said express-agent a sealed package, containing the sum of $3,000.00, addressed to the Planters' National Bank, Louisville, Ky., without disclosing the ownership of said money. The evidence before the jury tended to show that nothing was said by the express-agent or by said paying-teller, at the time said bill of lading was delivered to the
27 latter and said money received by the former, about the conditions and exceptions contained in said bill of lading or of the insurence of said package, and the evidence tendered to show that in all the packages that said paying-teller ever delivered at the Southern Express Company his attention was never called by said company to the exceptions and conditions in the body of the bill lading dated July 26, 1869; and the evidence further tendered to show that the said cashier had never read one of said bills of lading through; the evidence tendered to show that both the cashier and teller had the knowledge, as above indicated, as possessed by the bank. The evidence further tendered to show that said teller sent said bill of lading to the plaintiff, at Louisville, Ky.

The evidence before the jury further tended to show that the Southern Express Company transported said package by railroad as far as Humbolt, Tennessee, and there delivered the same to John Dugan, who was a messenger of the Adams Express Company, and also a messenger of the Southern Express Company, to complete the transportation of the same to Louisville, and to make delivery thereof to plaintiff, and he received the same for that purpose.

The evidence further tendered to show that said Dugan placed said package containing said money in a sheet-iron safe, braced with iron bands and weighing about eighty pounds, used by the Adams and Southern Express Companies for the carrying of valuables, not burglar or fire proof nor intended to be such, but such as was generally used by
28 express companies for the carrying of valuables, and said messenger placed said iron safe in an apartment of a car of the Louisville and Nashville Railroad Co. set apart for the use of said express companies under an arrangement to that effect between said express companies and said railroad company, to be therein carried to Louisville, Ky.

The evidence further showed that while said package was in course of transportation to Louisville in said car, said package being in charge of said messenger, Dugan, a trestle at Budd's Creek, Tenn., on the line and part of said railroad, during the night gave way while the train of cars belonging to and controlled by said railroad company, of which said car containing said package was a part, was passing over said trestle, and said train with said car was precipitated from said track, whereby said car, with others, caught fire from the locomotive and burned said car, also consuming the money in said safe. The evidence further tendered to show that said messenger, Dugan, was severely injured, and rendered insensible by the falling of said car through the trestle, and remained in that condition until after the package containing said money had been consumed by fire whilst in said iron safe. The evidence further tendered to show that within thirty days after the 26th of July, 1869, the plaintiffs tendered to defendant the sum of $34 for carriage, which was amount charged under said bill of lading as signed, & which was one-half of the amount which would have been charged had thet insurance-blank on the bill of lading been filled up, and demanded of defendant, both orally and in writing, the delivery of said package and money, accompanied by said original receipt or bill of lading dated July 26th, 1869, in which written demand it was stated that the plff. denied that the special conditions or agreement, printed on said bill of lading, were notified to the person to whom the same was delivered, or to said bank, or were assented to by him or by the Planters' National Bank, or constituted any part of said contract of transportation of said package, and that defendant failed to deliver said package upon said demand or since.

29

Before the court gave its charge to the jury the plaintiff asked the court to instruct the jury as follows:

Circuit court of the United States, sixth circuit and Kentucky district.

PLANTERS' NATIONAL BANK
vs.
THE ADAMS EXPRESS CO.

1st. The jury are instructed that an express company, which is in the habit of carrying for hire packages containing United States legal-tender notes, bank-notes, currency, and other valuables, from one place to another, is a common carrier; and the fact that they carry such packages and articles over routes where they employ other vehicles or means of conveyance than their own, in no way affects their liabilities as common carriers.

30

2nd. At common law a common carrier is an insurer of the goods and valuables intrusted to him, and he is responsible for all losses of the same save such as are occasioned by the act of God or the public enemy; but he may, however, by an express agreement, which is understandingly assented to by the shipper and which is just and reasonable, limit his liability as a common carrier, and the burden is on him to show that he has restricted his common-law responsibility by such a contract.

3rd. If the jury believe, from the evidence, that the defendant, at the time of the loss of the package in the pleadings mentioned, for the value of which this suit was brought, was publicly engaged in transporting United States legal-tender notes, national and other bank notes, fractional and other currency, and other valuables, from one place to an-

other for hire, it was a common carrier, and subject to all the responsibilities of a common carrier, except so far as it may have modified them by an express agreement which was understandingly assented to by the shipper, made at the time of such shipment; and if the jury believe, from the evidence, that the defendants did, in this case, so limit their liability to the plaintiffs, such limit of liability must govern, but that does not relieve defendant and the agencies employed by it in ex-
31 ecuting its undertakings from ordinary care in the discharge of its and their duties. The burden of proof to show such an express contract is upon the defendant, and the assent to such modifications and restrictions cannot depend upon implication or inference founded on doubtful and conflicting evidence, but the evidence of such assent must be specific and certain, leaving no room for controversy between the parties.

4th. If the jury believe, from the evidence, that the Southern Express Company, being engaged in the business of transporting money, goods, and other personal property for hire, did, on the 26th July, 1869, receive from the Louisiana National Bank a sealed package, addressed to the plaintiffs, containing the sum of $3,000.00, to be transported to Louisville, Ky., and there delivered to the plaintiffs, The Planters' National Bank; and if the' further believe that in the course of such transportation the deft., The Adams Express Company, being engaged in the like business of transportation, by its messenger and agent, received said money for the purpose of completing said transportation and making said delivery; and if they further that said money has not been delivered to plff., but was destroyed by reason of the breaking or falling down of a trestle on the line of the Louisville and Nashville Railroad, causing the car in which said money was being carried,
32 while passing over said trestle, to be precipitated from said road, whereby said car, with said money, was burned & destroyed, then the law is for the plaintiff, and the jury must so find, unless they believe, from the evidence, that said money was received by the Southern Express Co. under an express agreement between it and the Louisiana National Bank that it was to be transported upon the terms and conditions set forth in the printed bill of lading or receipt read in evidence as part of deposition of Shackelford, and dated July 26th, 1869, in which event the rights of the parties are to be controlled by such terms and conditions as indicated in other instructions given to the jury.

5. If the jury believe, from the evidence, that the Southern Express Company was, on the 26th day of July, 1869, engaged in carrying, for hire, from one place to another, packages of money, United States Treasury legal-tender notes, national and other bank notes, fractional and other currency, and other valuables, whether in its own or the vehicles of others; and that, whilst so engaged, said company, on the 26th July, 1869, received at New Orleans, from the Louisiana National Bank, a sealed package, addressed to plaintiff, containing $3,000.00, to transport the same to the city of Louisville, Ky., by itself and the defendant, and then to be delivered to plaintiffs by defendant, there being a business arrangement or usage for such transportation between
33 the two companies, and that said package was so received by said Southern Express Company upon an express contract made at the time with said Louisiana National Bank that said transportation and delivery should be executed upon the terms and conditions set out in the bill of lading or receipt attached to the deposition of Shackelford, dated July 26th, 1869, and read in evidence; and that, in the course of such transportation, said package came into the possession of the de-

fendant, or its messenger, or a joint messenger of said Southern and said Adams Express Companies, to complete the transportation and delivery thereof upon the terms of said receipt or bill of lading, and in accordance with business arrangements between the two said companies, the said defendant being at the time engaged in the like business of transportation for hire; and such package, being in the custody and control of such agent, was by him, in order to complete the transportation and delivery thereof, placed in one of the cars of the railroad known as the Louisville & Nashville & Great Southern Railroad Co., set apart under an arrangement between said railroad co. and said express companies, or between it and defendant, for the goods, money, valuables, and other property transported by said companies, or by defend-
34 ant, on said road; and that whilst said package was being so transported, a portion of the trestle-work of said road at or near Budd's Creek fell and was crushed as the car in which said package was carried was passing over the same, by which the same was lost; then the burden of proof is upon the defendant to show that the breaking or falling of said trestle could not have been avoided by reasonable care and diligence on the part of the agents, servants, and employees of said railroad co. having charge, oversight, and control of said road, cars, and trestle; and unless it so appears from the evidence, the jury must find for the plaintiffs the sum of $3,000.00, and may, in their discretion, give interest on said sum from the time that plaintiffs demanded said package and its contents of defendant.

If the jury believe, from the evidence, that there was on the 26th of July, 1869, a business arrangement existing between the defendant and the Southern Express Co., by which express-matter shipped from New Orleans to Louisville was to be carried partly under the charge of the latter company and partly by the defendant, the compensation therefor to be prorated between them, and that the package in question was received for transportation by said Southern Express Company on the 26th of July, 1869, to be transported as aforesaid from New Or-
35 leans to Louisville; and the same was transported under such agreement by said company and defendant on the railroad known as the Louisville & Nashville and Great Southern Railroad upon the terms and conditions of the receipt dated July 26, 1869, attached to Shackelford's deposition, in a car of said road set apart under an arrangement between said road and said express companies, or either of them; and whilst being so transported, a portion of the trestle-work of said road fell, or was crushed, as the car on which said package was being carried was passing over the same, whereby said package was lost, then the burden of proof is upon the defendant to show that the breaking and falling of said trestle could not have been avoided by reasonable care and diligence on the part of the agents, servants, and employees of said railroad co. having charge, oversight, and control of said road and trestle. And unless it so appears from the evidence the jury must find for the plaintiffs the sum of $3,000.00, and in their discretion may give interest on said sum from the time that plaintiffs demanded said package and its contents of defendant.

7. In determining whether the Louisiana National Bank expressly agreed to the conditions set out in the printed bill of lading dated July 26, 1869, the jury are instructed—

1. That the burden of proof in this case is upon the defendant to show that the said bank expressly assented to said conditions as
36 a part of the contract of shipment, intending thereby to relieve said Southern Express Company from responsibility for the loss

of said money in the states of case provided for in said printed conditions, and unless such express assent is shown, from all the evidence, the jury must find for the plaintiff.

2. Such express assent must not depend upon implication or inference, founded on doubtful and conflicting evidence, but must be specific and certain, leaving no room for controversy between the parties, before the jury are authorized to find that such assent was given.

3. For the purposes of this case the Adams Express Company is entitled to the benefits and subject to all the responsibilities of any contract or agreement which the jury may, under the instructions, find was made between the Southern Express Co. and the Louisiana National Bank.

8. The jury are instructed that if they believe, from the evidence, that the Planters' National Bank instructed the cashier of the Louisiana National Bank to ship said sum of $3,000.00 to it by express, and gave no instructions to assent to such conditions as are set out in said printed bill of lading, dated July 26th, 1869, and if they further believe that said cashier instructed the paying-teller to execute said order, and gave him no other instructions in reference to said shipment, then said paying-teller had no authority, on behalf of said Louisiana National
37 Bank, or of plaintiff, to assent to such conditions, and they constitutes no part of the contract of shipment, unless the jury find from the evidence that subsequent to the receipt of said money by the Southern Express Co. either the said Louisiana National Bank, or the Planters' National Bank, expressly ratified said conditions, and the burden of proving such ratifications is upon the defendant.

9. The jury are instructed that although they may believe, from the evidence, that an arrangement was made between the Southern and Adams Express Companies by which the route of the former should extend as far north as Guthrie, and the route of the latter as far south as Guthrie, still if there was an arrangement between said companies by which they should collect express charges for the whole route between New Orleans and Louisville, by which they had common or joint messengers between Louisville and Memphis, under which expenses and receipts on business for said route between Louisville and Memphis were ascertained and settled between said companies from time to time, and divided according to the lengths of their respective lines between Louisville and Memphis, and if they further believe that the said sum of $3,000.00 was received by John Dugan for transportation and was in his possession when destroyed as stated in instruction for plff., No. 5, and that John Dugan was then employed and paid as such messenger by the Adams Express Co. and the Southern Express Co. jointly, or by the Adams Express Co. alone, then he is to be deemed the agent and messenger
38 of said Adams Express Company.

10. The jury are instructed that a loss by the "dangers of railroad transportation," within the meaning of the receipt of 26th July, 1869, shown in this case, is such a loss as could not have been guarded against by the ordinary exertion of human skill, care, and prudence.

If, therefore, the jury believe, from the evidence, that the package in question came into the possession and custody of a messenger of defendant, or of a joint messenger of defendant and the Southern Express Company, to complete its transportation and make delivery thereof to plaintiffs, according to the terms and conditions of said receipt or bill of lading, and that whilst said package was being transported over the railroad known as the Louisville & Nashville and Great Southern Railroad Co. it was lost by fire resulting from the falling or giving way

of the trestle-work of said road under the car in which said package was carried, and that the falling or giving way of said trestle could not have been guarded against by the ordinary exercise of human skill, care, and prudence on the part of those having charge and control of said road and trestle, they will find for plffs.

And the jury are further instructed that if said package was destroyed by fire which resulted from or was occasioned by the falling of said trestle and car, the loss thereof was not a loss by fire within the meaning of said receipt of 26th July, 1869.

39 11. Although the jury may believe that the Louisiana National Bank expressly assented to the printed terms and conditions set out in the printed bill of lading, dated July 26th, 1869, as part of the contract of shipment of said sum of $3,000.00, the jury are instructed that the blank as to insurance at the end of said bill of lading constituted no part of said contract, and the knowledge by the officers of the Louisiana National Bank of the different rates of charges upon goods or property insured or uninsured, or the absence of any intention on the part of said bank-officers to insure said money, cannot affect said contract or modify said printed conditions.

12. That the defendant is liable for the negligence or the want of ordinary care of the Louisville & Nashville and Great Southern Railroad Co. in keeping its track, bridges, &c., in order while plaintiff's package of legal tenders was being transported over said company's road, and although the burden of proving negligence in this respect is on the plaintiffs, yet the jury may, from the fact of the falling of the trestle as proven in this case, presume negligence upon the part of said company and defendant, and in the absence of satisfactory evidence showing that ordinary care was used by said company in and about the said trestle which fell the jury should find for the plaintiff.

40 13. Although the jury may believe, from the evidence, that the money contained in the sealed package, delivered in the Louisiana National Bank to the Southern Express Company, was destroyed by fire, and that that fire was caused by the falling or breaking of a trestle on the line of the Louisville & Nashville Railroad, whereby the car in which said money was being carried was precipitated from said road, and set on fire from the engine and said money consumed, and although the jury may further believe that the Louisiana National Bank at the time of the shipment of said package expressly assented to the printed terms and conditions set forth in said printed bill of lading dated July 26th, 1869, said loss cannot be deemed to have been occasioned either by the dangers of railroad transportation or by fire, within the meaning of said bill of lading, unless it appears from the evidence that the breaking of said trestle and the falling of said cars could not have been avoided by the exercise of reasonable care and diligence by the agents, servants, and employees of said road then and there engaged in and about the control and management of said cars, road, & trestle.

14. If the jury believe from the evidence that the currency, $3,000.00, was shipped by the Louisiana National Bank on the 26th July, 1869, to the plaintiff upon the terms set out in said bill of lading of that

41 date, and was received by a messenger of the Adams Express Company, or by a joint messenger of the Adams & Southern Express Companies to complete the transportation of same to plaintiff, said Adams Express Co. being at the time engaged in the business of transporting money, currency, and personal property for hire, it was the duty of such messenger to take reasonable care and precautions to

guard said currency against destruction by fire while in his custody in the course of transportation, and if the jury believe that said currency when destroyed by fire was kept by said messenger in a sheet-iron safe, and that said iron safe was not reasonably sufficient to protect said currency against fire, and if they further believe said currency could have been protected against said fire by reasonable care and precautions on the part of said express messenger, then the law is for plaintiff, and the jury should so find.

And thereupon the court charged the jury upon the whole case; which charge in full is as follows:

If the jury believe, from the evidence, that the defendant, the Adams Express Co., is engaged in the business of carrying money and other articles from one part of the country to another for hire, it is a common carrier, though it uses railroad-cars and steamboats belonging to other parties and companies over which it has no control.

42 If they further believe that the Southern Express Company is engaged in like business, it also is a common carrier.

If the Southern Express Co. and the Adams Express Co. are engaged in the carrying of money and other articles by the railroads through Louisiana and Mississippi to Humboldt, Tenn., and thence over the Louisville & Nashville R. R. to Louisville, Ky., under a contract by which they divide the compensation, having relation to the distance the article is transported by each company; that between Humboldt, Tenn., and Louisville, Ky., both companies employ the same messenger or agent, the Adams Express Company is liable for articles delivered to this agent at Humboldt, to be transported to Louisville, though the loss occurred in the State of Tenn., and though the arrangement between the two express companies in terms contemplates that such agent or messenger is entirely and only subject to the orders of the Adams Express Co. north of the northern boundary of the State of Tenn., and south of that line is subject entirely and only to the orders of the Southern Express Co.

It is proven incontestably, and indeed it is conceded, that there was delivered to the messenger of the Southern and Adams Express Companies at Humboldt, Tenn., $3,000.00 by the messenger of the Southern Express Co., to be carried to Louisville and delivered to the plaintiff. It is conceded that this money was never delivered to the plaintiff.

It therefore follows that the defendant is liable to the plaintiff
43 for the damage which it sustained unless the defendant is excused by the "act of God or the public enemy," or by some stipulation or exception in the contract to carry.

The evidence tends to show that these express companies from New Orleans to Louisville were in the habit of charging one price when they undertook to insure the safe delivery of articles entrusted to them, that is, when they retained their ordinary responsibility as common carriers, and that they charged another and much less sum when their responsibility was limited.

The evidence further tends to show that the Louisiana National Bank was aware of this regulation of the express companies, and that it in fact had in its possession bills of lading, unsigned blanks, but showing the conditions and exceptions upon which the companies transported at the smaller rate, and in the margin blanks indicating that the companies would insure; that with the blank bills of lading in its possession, having received from the plaintiff a letter directing it to forward by express to plaintiff the sum of money above mentioned, to wit, the sum of $3,000.00, its teller filled the blank bill of lading with these words:

"$3,000.00." "JULY 26," '9

"Lou Nat'l Bank, one package." "Three thousand dollars,"

44 "Planters' National Bank, Louisville, Ky." Coll."

And the bill of lading thus filled up, and when signed, read as follows, in written and printed matter:

"*Domestic bill of lading.*

"SOUTHERN EXPRESS COMPANY.—EXPRESS FORWARDERS.

"No. 2. $3,000.00. JULY 26, 1869.

"Received from La. Nat. Bank, one package, sealed, and said to contain three thousand dollars, addressed Planters' National Bank, Louisville, Ky. Freight coll.

"Upon the special acceptance and agreement that this company is to forward the same to its agent, nearest or most convenient to destination, only, and there to deliver the same to other parties to complete the transportation, such delivery to terminate all liability of this company for such package; and also that this company are not to be liable in any manner or to any extent for any loss, damage, or detention of such package, or of its contents, or of any portion thereof, occasioned by the acts of God, or by any person or persons acting or claiming to act in any military or other capacity in hostility to the Government of the United States, or occasioned by civil or military authority, or by the acts of any armed or other mob or riotous assemblage, piracy, or the dangers incident to a time of war, nor when occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or steam. The

45 shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and inure to the benefit of each and every company or persons to whom the Southern Express Company may intrust or deliver the above-described property for transportation, and shall define and limit the liability therefor of such other company or person. In no event is this company to be liable for a greater sum than that above mentioned, nor shall it be liable for any such loss unless the claim therefor shall be made in writing, at this office, within thirty days from this date, in a statement to which this receipt shall be annexed.

"Freight coll.

"For the company.

"SHACKELFORD."

Across the left-hand end of said receipt was the following printed matter:

"Insured by Southern Express Company for , to only, except against loss occasioned by the public enemy.

"For the company.

"Insurance, $."

This bill of lading, thus filled, was presented by the teller of the Louisiana National Bank to the Southern Express Company for signature, and he at the same time delivered to it the package of money without disclosing who was the owner of it, but addressed to the plaintiff at Louisville; that the bill of lading was signed and redelivered to the teller, and forwarded to the plaintiff at Louisville. If you believe these

46 facts, then the bill of lading thus signed constitutes the contract, and all of the exceptions in it are a part of the contract, no matter whether each or all of them were known to the Louisiana National Bank or not, and the plaintiff is bound by this contract, whether it expressly authorized the Louisiana National Bank to make it or not.

The evidence tending to show that the bill of lading was not read at the time of the signing, and that nothing was said about the exceptions contained in it, is immaterial.

The evidence further shows that while the package was in the custody of the joint messenger of the Southern Express Co. and the Adams Express Co., between Humboldt and the northern line of Tennessee, the railroad-car in which the package was and several other cars in the same railroad train were precipitated through a trestle-work on the line of the Louisville & Nashville R. R., at or near Budd's Creek, in the State of Tennessee, and the car containing such package, and the package itself, were destroyed by fire, which arose from the fallen locomotive setting fire to the car in which the package was carried, some forty or forty-five minutes after the accident occurred, without any fault or neglect on the part of the messenger having charge of the package.

Now, if the bill of lading contained no exceptions, it is clear that the defendant would not be excused because the accident occurred
47 without its fault. It would be the insurer, and therefore accountable.

But the bill of lading contains, among other exceptions, this: "That the company are not to be liable, in any manner or to any extent, for any loss or damage for such package or its contents * * * occasioned * * by fire * * * *."

Now, if you believe that the package was destroyed by fire as above indicated, without any fault or neglect whatever on behalf of the messenger or the defendant, the defendant has brought itself within the terms of the exception, and is not liable.

It is not material to inquire whether the accident resulted from the want of care or from the negligence of the Louisville & Nashville R. R. Co. and its agents or not, since the uncontested testimony shows that the car and train in which the messenger of the Adams Express Company was transporting the package belonged to the Louisville and Nashville R. R. Co., and was exclusively subject to its control and orders.

A common carrier who has not limited his responsibility is undoubtedly responsible for losses, whether occurring on vehicles controlled by himself exclusively or belonging to and controlled by others, because he is an insurer for the safe delivery of the article which he has agreed to carry.

But when he has limited his liability so as to make himself re-
48 sponsible for ordinary care only, and the shipper, to recover against him, is obliged to aver and prove negligence, it must be his negligence or the negligence of his agents, and not the negligence of persons over whom he has no control.

If in his employment he uses the vehicles of others, over which he has no control, and uses reasonable care—that is, such care as ordinary prudent persons engaged in like business use in selecting the vehicles, and if the loss arises from a cause against which he has stipula
the shipper, he shall not be liable for the same unless it arises f
want of care or the want of care of his employees.

Without, therefore, deciding whether or not the evidence ad
the case tends to establish any want of reasonable or ordinary care on

"$3,000.00." "JULY 26," '9

"Lou Nat'l Bank, one package." "Three thousand dollars,"

44 "Planters' National Bank, Louisville, Ky." Coll."

And the bill of lading thus filled up, and when signed, read as follows, in written and printed matter:

"*Domestic bill of lading.*

"SOUTHERN EXPRESS COMPANY.—EXPRESS FORWARDERS.

"No. 2. $3,000.00. JULY 26, 1869.

"Received from La. Nat. Bank, one package, sealed, and said to contain three thousand dollars, addressed Planters' National Bank, Louisville, Ky. Freight coll.

"Upon the special acceptance and agreement that this company is to forward the same to its agent, nearest or most convenient to destination, only, and there to deliver the same to other parties to complete the transportation, such delivery to terminate all liability of this company for such package; and also that this company are not to be liable in any manner or to any extent for any loss, damage, or detention of such package, or of its contents, or of any portion thereof, occasioned by the acts of God, or by any person or persons acting or claiming to act in any military or other capacity in hostility to the Government of the United States, or occasioned by civil or military authority, or by the acts of any armed or other mob or riotous assemblage, piracy, or the dangers incident to a time of war, nor when occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or steam. The

45 shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and inure to the benefit of each and every company or persons to whom the Southern Express Company may intrust or deliver the above-described property for transportation, and shall define and limit the liability therefor of such other company or person. In no event is this company to be liable for a greater sum than that above mentioned, nor shall it be liable for any such loss unless the claim therefor shall be made in writing, at this office, within thirty days from this date, in a statement to which this receipt shall be annexed.

"Freight coll.

"For the company.

"SHACKELFORD."

Across the left-hand end of said receipt was the following printed matter:

"Insured by Southern Express Company for , to only, except against loss occasioned by the public enemy.

"For the company.

"Insurance, $."

This bill of lading, thus filled, was presented by the teller of the Louisiana National Bank to the Southern Express Company for signature, and he at the same time delivered to it the package of money without disclosing who was the owner of it, but addressed to the plaintiff at Louisville; that the bill of lading was signed and redelivered to the teller, and forwarded to the plaintiff at Louisville. If you believe these

46 facts, then the bill of lading thus signed constitutes the contract, and all of the exceptions in it are a part of the contract, no matter whether each or all of them were known to the Louisiana National Bank or not, and the plaintiff is bound by this contract, whether it expressly authorized the Louisiana National Bank to make it or not.

The evidence tending to show that the bill of lading was not read at the time of the signing, and that nothing was said about the exceptions contained in it, is immaterial.

The evidence further shows that while the package was in the custody of the joint messenger of the Southern Express Co. and the Adams Express Co., between Humboldt and the northern line of Tennessee, the railroad-car in which the package was and several other cars in the same railroad-train were precipitated through a trestle-work on the line of the Louisville & Nashville R. R., at or near Budd's Creek, in the State of Tennessee, and the car containing such package, and the package itself, were destroyed by fire, which arose from the fallen locomotive setting fire to the car in which the package was carried, some forty or forty-five minutes after the accident occurred, without any fault or neglect on the part of the messenger having charge of the package.

Now, if the bill of lading contained no exceptions, it is clear that the defendant would not be excused because the accident occurred
47 without its fault. It would be the insurer, and therefore accountable.

But the bill of lading contains, among other exceptions, this: "That the company are not to be liable, in any manner or to any extent, for any loss or damage for such package or its contents * * * occasioned * * by fire * * * *."

Now, if you believe that the package was destroyed by fire as above indicated, without any fault or neglect whatever on behalf of the messenger or the defendant, the defendant has brought itself within the terms of the exception, and is not liable.

It is not material to inquire whether the accident resulted from the want of care or from the negligence of the Louisville & Nashville R. R. Co. and its agents or not, since the uncontested testimony shows that the car and train in which the messenger of the Adams Express Company was transporting the package belonged to the Louisville and Nashville R. R. Co., and was exclusively subject to its control and orders.

A common carrier who has not limited his responsibility is undoubtedly responsible for losses, whether occurring on vehicles controlled by himself exclusively or belonging to and controlled by others, because he is an insurer for the safe delivery of the article which he has agreed to carry.

But when he has limited his liability so as to make himself re-
48 sponsible for ordinary care only, and the shipper, to recover against him, is obliged to aver and prove negligence, it must be his negligence or the negligence of his agents, and not the negligence of persons over whom he has no control.

If in his employment he uses the vehicles of others, over which he has no control, and uses reasonable care—that is, such care as ordinary prudent persons engaged in like business use in selecting the vehicles, and if the loss arises from a cause against which he has stipulated with the shipper, he shall not be liable for the same unless it arises from his want of care or the want of care of his employees.

Without, therefore, deciding whether or not the evidence adduced in the case tends to establish any want of reasonable or ordinary care on

the part of the Louisville & Nashville R. R. Co., I instruct you that such evidence is irrelevant and incompetent, and that you should disregard it; that is, give no more effect to it than if it had not been adduced.

But it is claimed by the plaintiff that the defendant was wanting in care in the use of the safe or box in which the package was at the time of the loss. If there was any want of reasonable care in this particular, the defendant is undoubtedly liable, but if the safe was such
49 as prudent persons engaged in like employment generally use for like purposes, there was no want of care, and the defendant is not responsible for want of care in this particular.

The defendant has asked the court to modify the charge now given, as follows, to wit:

That the testimony tends to prove that the said Louisiana National Bank had been in the habit when it sent money on its own account by said express company of sending on the insurance rates, and in such cases caused the blanks for contract of insurance on the end or margin of the printed blank to be filled and signed by the agent of the express co., but did not ask or have that blank filled or signed in this case because the plaintiff did not direct insurance, and it was the custom of said Louisiana National Bank not to contract for said insurance rates for consignees unless specially directed to do so by the consignee.

All this might be material under some circumstances, but in this case I think the modification asked for not material, and I therefore decline to give it.

I decline to give any of the instructions asked by the plaintiff, because I think all that is correct in them is abstract, or is embodied in those given.

The plaintiff, at the time of said charge, excepted & still excepts to certain portions thereof to the extent indicated in plaintiff's bills
50 of exceptions Nos. 2, 3, & 4 & 5.

The court at the time of its said charge to the jury refused to give any of the said instructions asked by plaintiff, upon the ground that it considered the charge given by the court to the jury as embodying all that was correct in the said instructions asked by plaintiff, to which action of the court in refusing to give each of said instructions the plaintiff at the time excepted, and still excepts; and prays that this his bill of exceptions be signed, sealed, enrolled, & made part of the record; which is done this 15th July, 1874.

BLAND BALLARD. [SEAL.]

The plaintiff, by its attorneys, tendered its bill of exceptions No. 2, which is signed & sealed by the court, and ordered to be entered of record, & which is as follows:

Plff's. bill of exceptions No. 2.

PLANTERS' NATIONAL BANK
vs.
ADAMS EXPRESS CO.

Be it remembered that after the evidence had been closed, and after the plaintiff had asked the court to instruct the jury as set out in bill of exception No. 1, the court charged the jury as follows:

"It is proven incontestably, and indeed it is conceded, that there was delivered to the messenger of the Southern and Adams Express Com-

panies, at Humboldt, Tenn., $3,000, by the messenger of the South-
51 ern Express Co., to be carried to Louisville and delivered to the plaintiff. It is conceded that the money never was delivered to the plaintiff. It therefore follows that the defendant is liable to the plaintiff for the damage which it sustained, unless the defendant is excused by the 'act of God or the public enemy,' or by some stipulation or exception in the *the* contract to carry.

"The evidence tends to show that these express companies (the Adams and Southern) from New Orleans to Louisville were in the habit of charging one price when they undertook to insure the safe delivery of articles entrusted to them, that is, when they retained their ordinary liability as common carriers, and that they charged another and much less sum when their liability was limited.

"The evidence further tends to show that the Louisiana National Bank was aware of this regulation of the express companies, and that it in fact had in its possession bills of lading, unsigned, showing the conditions and exceptions upon which the companies transported at the smaller rate, and in the margin indicating that the companies would insure; that with this blank in its possession, having received from the plaintiff a letter directing it to forward by express to plaintiff the sum of money above mentioned, to wit, the sum of $3,000, its teller
52 filled that blank bill of lading with these words and figures:

"'$3,000.' 'JULY 26,' '9.'

"'Lou. Nat. Bank, one package.' 'Three thousand dollars.' 'Planters' National Bank, Louisville, Ky.'

"And the bill of lading thus filled up, and when signed, read as follows, in written and printed matter, viz:

"'*Domestic bill of lading.*

"'SOUTHERN EXPRESS COMPANY.—EXPRESS-FORWARDERS.

"'No. 2. $3,000.] JULY 26, 1869.

"'Received from Lou. Nat. Bank, one package, said to contain three thousand dollars, addressed Planters' National Bank, Louisville, Ky.

"'Upon the special acceptance and agreement that this company is to forward the same to its agent nearest or most convenient to destination only, and there to deliver the same to other parties to complete the transportation, such delivery to terminate all liability of this company for such package, and also that this company are not to be liable in any manner or to any extent for any loss, damage, or detention of such
53 package, or of its contents, or of any portion thereof, occasioned by the acts of God or by any person or persons acting or claiming to act in any military or other capacity in hostility to the Government of the United States, or occasioned by civil or military authority, or by the acts of any armed or other mob or riotous assemblage, piracy, or the dangers incident to a time of war, nor when occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or steam. The shipper and owner hereby severally agree that all the stipulations and conditions in this receipt shall extend to and inure to the benefit of each and every company or person to whom the Southern Express Company may intrust or deliver the above-described property for transportation, and shall define and limit the liability therefor of such other company or person. In no event is this company to be liable for a greater sum than that above mentioned, nor shall it be liable for

any such loss unless the claim therefor shall be made in writing, at this office, within thirty days from this date, in a statement to which this receipt shall be annexed.

" 'Freight coll.

" 'For the company. SHACKELFORD."

" 'Across the left-hand end of said receipt was the following printed matter:

54 " 'Insured by the Southern Express Company for to only, except against loss occasioned by the public enemy.

" 'For the company.

" 'Insurance $.'

"This bill of lading thus filled was presented by the teller of the Louisiana National Bank for signature, at the same time delivering to it the package of money, without disclosing who was the owner of it, but addressed to the plaintiff at Louisville; that the bill of lading was signed and redelivered to the teller, and forwarded to the plaintiff at Louisville.

"If you believe these facts, then the bill of lading thus signed constitutes the contract, and all the exceptions in it are a part of the contract, no matter whether each or all of them were known to the Louisiana National Bank or not, and the plaintiff is bound by this contract, whether it expressly authorized the Louisiana National Bank to make it or not. The evidence tending to show that the bill of lading was not read at the time of the signing, and that nothing was said about the exceptions contained in it, is immaterial."

At the time the court charged the jury as above set forth the plaintiff excepted & still excepts to the correctness of the proposition of law stated in following portion of said charge, viz:

55 "If you believe these facts, then the bill of lading thus signed constitutes the contract, and all the exceptions in it are a part of the contract, no matter whether each or all of them were known to the Louisiana National Bank or not, and the plaintiff is bound by this contract, whether it expressly authorized the Louisana National Bank or not."

And the plaintiff also at the same time excepted & still excepts to the correctness of the proposition of law stated in the *the* following portion of said charge, viz:

"The evidence tending to show that the bill of lading was not read at the time of the signing, and that nothing was said about the exceptions contained in it, is immaterial."

And the plaintiff prays that this his bill of exceptions be signed, sealed, enrolled, & made part of record, which is done this July 15th, 1874.

BLAND BALLARD. [L. S.]

The plaintiff, by its attorneys, tendered their bill of exception No. 3, which is signed & sealed by the court, and ordered to be entered of record; which is as follows:

Plff. bill of exceptions No. 3.

PLANTERS' NATIONAL BANK
vs.
ADAMS EXPRESS CO.

Be it remembered that upon the trial of this case before the

56 court & jury the evidence tended to show that on the 26th day of July, 1869, the Southern Express Company, a common carrier, received from the Louisiana National Bank, at New Orleans, for transportation, a sealed package, under the bill of lading, dated July 26th, 1869, and set out in bill of exceptions of plaintiff No. 2, containing three thousand dollars, addressed to the plaintiff at Louisville, Ky., and that in the course of transportation the same was received by a joint messenger of the Southern & Adams Express Companies, the Adams Express Company being also a common carrier, under the same bill of lading above referred to, at Humboldt, Tenn., to complete the transportation thereof to Louisville, the messenger of the Adams Express Company so receiving said package being also a messenger on said railroad of the Southern Express Company. And the evidence further tended to show that said joint messenger carried said package in the course of transportation in an apartment of a car belonging to the Louisville & Nashville R. R. Co. set apart to the use of said express companies under an arrangement with said railroad company.

Thereupon the court charged the jury as follows:

"The evidence further shows that while the package was
57 in the custody of the joint messenger of the Southern Express Co. and the Adams Express Co., between Humboldt and the northern line of Tennessee, the railroad-car in which the package was, and several other cars in the same railroad-train, were precipitated through a trestle-work on the line of the Louisville & Nashville R. R., at or near Budd's Creek, in the State of Tennessee, and the car containing such package, and the package itself, destroyed by fire, which arose from the fallen locomotive setting fire to the car in which the package was carried, some forty or forty-five minutes after the accident occurred, without any fault or neglect on the part of the messenger having charge of the package.

"Now, if the bill of lading contained no exception, it is clear that the defendant would not be excused because the accident occurred without its fault. It would be the insurer, and therefore accountable.

"But the bill of lading contains among other exceptions this: that the company are not to be liable in any manner or to any extent for any loss or damage for such package or its contents * * * occasioned * * * * * * by fire.

58 "Now, if you believe that the package was destroyed by fire as above indicated, without any fault or neglect whatever on behalf of the messenger or the defendant, the defendant has brought itself within the terms of the exception, and is not liable."

The plaintiff at the time excepted, and still excepts, to the proposition of law announced in the following portion of said charge, viz:

"Now, if you believe that the package was destroyed by fire as above indicated, without any fault or neglect whatever on behalf of the messenger or the defendant, the defendant has brought itself within the terms of the exception, and is not liable."

And the court at the same time also instructed the jury as follows:

"It is not material to inquire whether the accident resulted from the want of care, or from the negligence of the Louisville and Nashville Railroad Co. and its agents, or not, since the uncontested testimony shows that the car and train in which the messenger of the Adams Express Company was transporting the package belonged to the Louisville & Nashville Railroad Company, and was exclusively subject to its control and orders."

59 The plaintiff at the time excepted & still excepts to the giving

of so much of said instruction immediately preceding as stated to the jury that "it is not material to inquire whether the accident resulted from the want of care or from the negligence of the Louisville Railroad Company and its agents or not."

And at the same time the court also instructed the jury as follows: "But when he (the common carrier) has limited his liability so as to make himself responsible for ordinary care only, and the shipper to recover against him is obliged to aver and prove negligence, it must be his negligence or the negligence of his agents, and not the negligence of persons over whom he has no control."

To the giving of which last instruction to the jury the plaintiff at the time excepted, & still excepts, as to the proposition of law contained therein.

And at the same time the court also instructed the jury as follows: "If in his employment he (the common carrier) uses the vehicles of others, over which he has no control, and uses reasonable care, that is, such care as ordinarily prudent persons engaged in like business
60 use in selecting the vehicles, and if the loss arises from a cause against which he has stipulated with the shipper, he shall not be liable for the cause unless it arises from his want of care, or the want of care of his employees."

To the giving of which last instruction to the jury the plaintiff at the time excepted, and still excepts, as to the proposition of law contained therein.

And the court at the same time also instructed the jury as follows: "Without, therefore, deciding whether or not the evidence adduced in the case tends to establish any want of reasonable or ordinary care on the part of the Louisville and Nashville R. R. Co., I instruct you that such evidence is irrelevant and incompetent, and that you should disregard it; that is, give no more effect to it than if it had not been adduced."

To the giving of which last instruction to the jury the plaintiff at the time excepted as to so much of said instruction as instructed the jury that such evidence was irrelevant & incompetent, & directed them to disregard it.

And plaintiff prays that this bill of exceptions be signed,
61 sealed, enrolled, & made part of the record, which is done this 15th July, 1874.

BLAND BALLARD. [SEAL.]

The plaintiff, by its attorneys, tendered its bill of exceptions No. 4, which is signed and sealed by the court, and ordered to be entered of record; which is as follows:

Bill of exception No. 4.

PLANTERS' NATIONAL BANK
vs.
ADAMS EXPRESS COMPANY.

Be it remembered that on the trial of this cause before the court and jury the evidence tended to show that the sealed package in question, containing $3,000, addressed to the plaintiff at Louisville, Ky., in the course of transportation from New Orleans to Louisville, Ky., at Humboldt, Tenn., came to the hands of one Dugan, a joint messenger of the Southern Express and Adams Express Companies, to complete the trans-

portation to Louisville, Ky., the charges on such package to be collected at Louisville, Ky., by the Adams Express Co.

And the evidence tended to show that said package was received by said joint messenger, to be transported under the terms & conditions of the bill of lading, dated July 26th, 1869, set out in plff.'s bill of exception No. 2, and also in the charge of the court as given in plff.'s bill of exceptions No. 1.

62 And the evidence tended to show that said joint messenger upon receiving said package put it in a sheet-iron safe, neither burglar nor fire proof, nor intended to be such, and put said safe in an apartment of a car belonging to & controlled by the Louisville & Nashville Railroad Company, but set apart for the use of said express companies under an arrangement between them and said railroad company. The evidence further tended to show that while said package was in course of transportation in said car, said safe containing said money being in custody of said messenger, said car, with others in the train of said railroad, were precipitated from the railroad by the falling or breaking down of a trestle on the line & part of said road, while the train, of which said car formed a part, was passing over said trestle, and after said car fell through said trestle it caught fire from the locomotive in about 40 or 45 minutes after it fell & burned, and said money, while in said safe, was also consumed.

The evidence further tended to show that said iron safe was such as was generally used by express companies in the United States, and further tended to show that it was impracticable to use fire-proof iron safes in such business, because the smallest safes of that kind weighed

63 700 lbs.; it would be inconvenient to transfer them from one train to another, and for that reason they would have to be left behind ofter, which would increase the chances of outsiders taking impression of the locks.

Thereupon the court instructed the jury as follows:

"But it is claimed by the plaintiff that the defendant was wanting in care in the use of the safe or box in which the package was at the time of the loss. If there was any such want of reasonable care in this particular the defendant is undoubtedly liable, but if the safe was such as prudent persons engaged in like employment generally use for the purpose, there was no want of care, and the defendant is not responsible for want of care in this particular.

The plaintiff at the time, and still, excepts to the proposition of law contained in the following portion of said instruction, viz: "But if the safe was such as prudent persons engaged in like employment generally use for the purpose, there was no want of care, and the defendant is not responsible for want of care in this particular."

64 And the plaintiff prays that this his bill of exception be signed, enrolled, sealed, & part of the record, which is done this 15th July, 1874.

BLAND BALLARD. [SEAL.]

The plaintiff, by its attorneys, tendered its bill of exception No. 5, which is signed & sealed by the court and ordered to be entered of record; which is as follows:

Bill of exception No. 5.

PLANTERS' NATIONAL BANK }
vs.
THE ADAMS EXPRESS CO. }

Be it remembered that on the trial of this cause before the judge and

jury the evidence showed that on the 26th of July, 1869, the Louisiana National Bank delivered to the Southern Express Company, at the time a common carrier, a sealed package containing $3,000.00, addressed to the plaintiffs, to be transported and delivered to plaintiffs at Louisville, Ky., upon the conditions named in the bill of lading, dated July 26, 1869, set out in plff.'s bills of exceptions Nos. 1 & 2, & in the charge of the court set out in said exceptions, the charge therefor to be colected at Louisville by the defendant; that said package at Humboldt, Tennessee, was delivered by the messenger of said Southern Express Company to a John Dugan, a joint messenger of said Southern and Adams Express Compa-
65 nies, said Adams Express Company being also a common carrier, for the purpose of completing the transportation and making delivery of said package at Louisville, under and according to the said conditions in said bill of lading before referred to; that said messenger, Dugan, placed said package and money in a sheet-iron safe weighing about eighty pounds, and placed said safe in an apartment of a car belonging to the Louisville and Nashville Railroad; that said safe with said package of money in it was transported over the Louisville & Nashville Railroad on its way to Louisville; that during the course of transportation a trestle, a part of the line of said road, at or near Budd's Creek, in the State of Tennessee, fell or was broken down as the train passed over it, and said car containing said iron safe and package fell through the break of said trestle, and in about forty or fifty-five minutes afterwards the car took fire from the locomotive, and the package in said iron safe was consumed by fire.

A witness for plff., named A. D. Ross, testified that he went to the scene of the wreck with Maynard, a route-agent of the Southern Express Company, reaching the wreck about nine or ten hours after the accident occurred, and by direction of Maynard he brought away the iron
66 safe before referred to to Louisville.

In answer to the question, "Was there no evidence on the trestle of any disaster or accident?" he answered as follows: "Some of the timbers on the south end of the trestle seemed decayed. The trestle was broken down, and partly destroyed by fire. The length of the trestle broken down & destroyed was about 50 ft. When I say above that the timbers on the south end of the trestle seemed decayed, I mean on the south end of the break. The timbers on the north end of the break had been destroyed by fire." He further stated that he was at that time *that he was at that time* performing services for both express companies.

A witness for the defendant, named White, was sworn, and testified that he was at the time of the accident in the employ of the Louisville & Nashville Railroad as telegraph-dispatcher; that when the accident occurred he was on the train and went down with it when it fell; that during the night, and before the fire commenced by which the car was consumed, he discovered that one of the axles of one of the cars
67 in the train was broken; that he also discovered a latent defect in said broken axle, and that it was such as could not have been discovered before it was broke by an external examination; that this accident occurred about 2 o'clock a. m., it being a starlight night; that he, the witness, had been for several years an employee upon railroads as telegraph-dispatcher and messenger, but was not an engineer and had no practical knowledge as an engineer, nor of bridge-construction, or of car-building. From the motions of the cars before they went through the trestle it appeared to him as if some of them were off the rails before they fell.

A witness for defendant, named Meek, was sworn and testified that

at the time of the accident he had charge of the bridges and trestles on the Clarksville division of said road, which included the trestle-bridge at Budd's Creek; that he was a mechanical engineer; that he had been engaged in such business for twenty-five years; that it was his duty to make examination of bridges and trestles on said division; that he made such examination about once a month; that about two weeks before this accident he had examined the trestle that fell, and the bridge
68 over Budd's Creek; that said examination occupied ten or fifteen minutes, and was directed to the joints and such parts of the trestle and bridge where bolts were likely to come out; that he found the trestle in good condition, and that it was sound and well constructed, and had been rebuilt in 1866 of good sound timber; that he visited the scene of the accident on the day afterward, and found about 260 or 270 feet of the trestle down; that the trestle was stronger than the bridge, and that it was almost impossible to crush a trestle when properly constructed; that said trestle had been broken down in 1865 by a passing train and was rebuilt upon the same plan in 1866 of sound good timbers, and properly and skillfully built.

Witness Lowe, the conductor of said train, stated that the bridge and trestle were on a straight line and a down grade coming to Louisville; that when the trestle broke the train was running over it on schedule time, about 22 miles per hour. He further stated that the express-messenger Dugan was rendered insensible by the fall; remained until after the cars & money were burned.

Other witnesses in the case stated that the break in the trestle
69 at the time of the accident embraced about fifty feet thereof, and that the falling train knocked down other parts of the trestle.

And this was all the testimony in reference to the falling and breaking of said trestle.

And thereupon the court charged and instructed the jury as follows, viz:

"Without deciding whether or not the evidence adduced tends to establish any want of reasonable or ordinary care on the part of the Louisville & Nashville Railroad Company, I instruct you that such evidence is irrelevant and incompetent, and that you should disregard it; that is, give no more effect to it than if it had not been adduced."

And at the time of giving said charge and instruction to the jury, the plaintiff excepted and still excepts to the following parts thereof, viz: "I instruct you that such evidence is irrelevent and incompetent, and that you should disregard it; that is, give no more effect to it than if it had not been adduced."

Wherefore plaintiffs prays that this its bill of exceptions No. 5 be signed, sealed, enrolled and made part of the record; which is done this 15th day of July, 1874.

BLAND BALLARD. [SEAL.]

70 The defendant, by its attorneys, tendered its bill of exceptions, which is signed & sealed by the court, & ordered to be entered of record; which is as follows:

PLANTERS' NATIONAL BANK, PLAINTIFF,
vs.
THE ADAMS EXPRESS CO., DEFENDANT.

Be it remembered that on the trial of this cause the plaintiff read to the jury in evidence the deposition of Eugene Felix Garcia, who stated that on the 26th day of July, 1869, he was paying-teller of the Louisiana National Bank of New Orleans, and amongst other things the said

witness in said deposition stated on cross-examination as follows, to wit: "I always fill up the blank express-receipts. The same form of receipts are always used. If specially requested by the consignees the packages are insured. When we insure, the same form of receipt as this is used, but the Express Co. fills the blank across the left-hand end of the receipt relative to insurance. The blank in this shipment, as regards insurance, was not filled. I had no intention to insure this package or not, as the Louisiana National Bank's instructions from the Planters' National Bank was, 'send currency by express.' The Planters' National Bank did not instruct us to insure this package. We know as
71 far as the Louisville National Bank is concerned that we have to pay more freight when we insure than when we do not. When we insure it is always marked in the margin or blank for insurance. As far as the rates of freight are concerned I know, as a general thing, that there is a differance between insured and uninsured packages. When we insure we pay more than when we do not. When we insured, everything was covered against any loss; when we were uninsured such was not the case."

And the plaintiff also read to the jury in evidence the deposition of Abraham Lusia, who stated that in July, 1869, he was the cashier of the Louisiana National Bank of New Orleans, who, amongst other things, stated on examination-in-chief as follows, to wit: "I received the instructions from the Planters' National Bank, at Louisville, Ky., by letter to ship balance to their a/c by express," and gave instructions to the Louisiana National Bank's paying-teller to comply with the order on the same day that its letter was received. This paying-teller was Eugene F. Garcia."

And on cross examination he stated as follows, to wit:

Nothing was said in the instructions relative to any insurance of the money; it was simply, "Send balance to our account in currency by express." Nothing was said as to whether the charges were to be
72 paid in advance or on delivery. We never insure packages unless instructed; just simply deliver them to one express co. We also insure packages when instructed. I know that there is a difference between an insured or uninsured package sent by express.

When the Louisiana National Bank sends its own money it always insures the packages; that is, the express co. insures its safe delivery for us, for which we pay a higher rate of freight than on an uninsured package.

On this testimony the defendants, by their counsel, moved the court to charge the jury, or to add to the charge given, in substance, as follows, to wit:

That the testimony tends to prove that the said Louisiana National Bank had been in the habit when it sent mon'y on its own account by said express company of sending on the insurance rates, and in such cases caused the blank for contract of insurance on the end or margin of the printed blank to be filled and signed by the agent of the express company, but did not ask or have that blank filled or signed in this case, because the plaintiff did not direct insurance, and it was the custom of said Louisiana National Bank not to contract for said insurance
73 rates for consignees unless specially directed to do so by the consignee.

Which motion was ov'ruled by the court, to which the defendants, by their counsel, excepted at the time and still excepts, and pray that this their bill of exceptions may be signed, sealed, and enrolled, and made a part of the record; is *is* done accordingly this 15th day of July, 1874.

BLAND BALLARD. [SEAL.]

By consent of parties, it is ordered that the original bill of lading herein be attached to the transcript of the record to be forwarded to the Supreme Court.

And on another day of our term of our said court, to wit, on Tuesday, July 16, 1874, came the plaintiff, by John M. Harlan, & Barr & Goodloe, its attorneys, and moved the court to set aside the verdict and judgment herein, and to grant a new trial herein, upon the following grounds, viz:

1st. The verdict is against the law and evidence.

2nd. The court erred in the exclusion of evidence offered by plaintiff to the jury, to which action the plaintiff at the time excepted.

3rd. The court erred in refusing to exclude evidence offered by deft. to which plff. at the time excepted.

4th. The court erred in its charge to the jury upon both the law and evidence to which plff. at the time excepted.

5th. The court erred in refusing to give the instructions asked by the plff. to which plff. at the time excepted.

And on another day of our term of our said court, to wit, on
74 Thursday, August 6th, 1874, came the parties, by their attorneys. The court being now fully advised of and concerning the motion of the plaintiff to set aside the verdict and judgment, and for a new trial herein, it seems to the court the law is for the defendant. It is therefore considered by the court that the said motion be and the same is hereby overruled, to which ruling and judgment of the court the plaintiff, by its attorneys, excepted.

And afterwards, to wit, on Friday, the 7th day of August, 1874, came the plaintiff and tendered its appeal-bond herein, which is approved and filed, and which is as follows, to wit:

75 Circuit court of the United States, sixth circuit and district of Kentucky.

PLANTERS' NATIONAL BANK OF LOUISVILLE, plaintiff in error,
vs.
THE ADAMS EXPRESS COMPANY, DEFENDANT in error.

Know all men by these presents that we, the Planters' National Bank of Louisville and H. G. Phillips, are held and firmly bound unto the above-named Adams Express Company in the sum of two thousand dollars, to be paid to the said Adams Express Company; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 7th day of August, A. D. 1874.

Whereas the above-named Planters' National Bank of Louisville hath prosecuted a writ of error to the Supreme Court of the United States for the sixth circuit and district of Kentucky to reverse the judgment rendered in the said circuit court of the United States for the district of Kentucky, sitting at Louisville, against the said Planters' National Bank of Louisville, in the case of the said Planters' National Bank of Louisville, Kentucky, vs. The Adams Express Company:

Now, therefore, the condition of this obligation is such that if the above-named Planters' National Bank of Louisville shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail

to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

PLANTERS' NATIONAL BANK OF LOUISVILLE, [L. S.]
By J. W. BATCHELOR, *Cashier.* [L. S.]
H. G. PHILLIPS. [L. S.]

Taken and acknowledged before me this 7th day of August, A. D. 1874.

W. A. MERIWETHER,
U. S. Comr.

Approved.

BLAND BALLARD,
District Judge.

76 The original bill of lading referred to herein is follows, to wit:

Domestic bill of lading.

SOUTHERN EXPRESS COMPANY.—EXPRESS-FORWARDERS.

No. 2. $3,000.] JULY 26, 1869.

Received from La. Nat'l Bank one pack'ge, sealed, and said to contain three thousand dolls., addressed Planters' National Bank, Louisville, Ky., upon the special acceptance and agreement that this company is to forward the same to its agent nearest or most convenient to destination only, and there to deliver the same to other parties to complete the transportation, such delivery to terminate all liability of this company for such package; and also that this company are not to be liable in any manner or to any extent for any loss, damage, or detention of such package, or of its contents, or of any portion thereof, occasioned by the acts of God or by any person or persons acting or claiming to act in any military or other capacity in hostility to the Government of the United States, or occasioned by civil or military authority, or by the acts of any armed or other mob or riotous assemblage, piracy, or the dangers incident to a time of war, nor when occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or steam. The shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and enure to the benefit of each and every company or person to whom the Southern Express Company may intrust or deliver the above-described property for transportation, and shall define and limit the liability therefor of such other company or person. In no event is this company to be liable for a greater sum than that above mentioned, nor shall it be liable for any such loss unless the claim therefor shall be made in writing, at this office, within thirty days from this date, in a statement to which this receipt shall be annexed.

For the company.
(Signed) SHACKELFORD.
Freight coll.

Issued by Southern Express Company for to only, except against loss occasioned by the public enemy.
For the company.

_____.

Insurance, $.

DISTRICT OF KENTUCKY:

I, W. A. Meriwether, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do certify that the foregoing seventy-five pages contain a true and complete transcript of the record of the proceedings had in the court in the case mentioned in the caption hereof. I further that the bill of lading attached hereto is the original bill of lading referred to in the pleadings herein.

Witness my signature and the seal of said court this 14th day of September, 1874.

[SEAL.] W. A. MERIWETHER, *Clerk.*

Fee for transcript, $29.65.

(Indorsement on cover:) No. 273. The Planters' National Bank of Louisville, plaintiff in error, vs. The Adams Express Company. Kentucky C. C. U. S. Filed 29th September, 1874.

REC. 273—3

Supreme Court of the United States.

BANK OF KENTUCKY, ... Plaintiffs in Error,
vs.
ADAMS EXPRESS COMPANY, . Defendants in Error.

PLANTERS NATIONAL BANK, . Plaintiffs in Error,
vs.
ADAMS EXPRESS COMPANY, . Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

BARR, GOODLOE & HUMPHREY,
JOHN M. HARLAN,
Counsel for Plaintiffs in Error.

Supreme Court of the United States.

PLANTERS NATIONAL BANK, Plaintiffs in Error,
vs.
ADAMS EXPRESS COMPANY, Defendants in Error.

BANK OF KENTUCKY, . . . Plaintiffs in Error,
vs.
ADAMS EXPRESS COMPANY, Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

These two cases depend upon the same facts, involve the same questions of law, and will, therefore, be considered together.

FACTS.

The evidence tended to show the following facts:

The Planter's National Bank of Louisville, and the Bank of Kentucky, having money on deposit with the Louisiana National Bank at New Orleans, directed the latter bank to send by express their respective balances, in currency. The cashier of the

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The pages referred to in this brief will be those in the printed record of the case of the Planters National Bank vs. Adams Express Company.

bank at New Orleans directed the paying teller of that bank to attend to the shipment. The Louisiana National Bank had in its possession blank bills of lading, then in use by the Southern Express Company, containing various conditions and exceptions, and in the margin of such bills was a blank showing that the Express Company would insure against all loss except that occasioned by the public enemy. The Express Company was in the habit of charging a higher rate for transportation when they insured express matter, and a less rate when they transported upon the conditions set forth in the body of the bills of lading. The bank at New Orleans was aware of this regulation of the Express Company as to insurance.

With said blanks in his possession the paying teller inserted, in one for the Planter's National Bank, and one for the Bank of Kentucky, the amount of currency shipped, and also the names of the consignor and consignee, and, thus filled, the bills of lading were presented to the Southern Express Company at New Orleans by the paying teller, and having been signed by the agent of the Express Company, were returned to the paying teller, who then delivered to the express agent one package containing $3,000 addressed to the Planter's National Bank at Louisville, and one package containing $——— addressed to the Bank of Kentucky at the same place.

Nothing was said at the time about the ownership of the money, nor was anything said about the conditions or exceptions contained in the bills of lading, or of the insurance of either package. In fact, the attention of the paying teller was never, upon any occasion when he delivered packages for transportation, called by the Express Company to the conditions contained in the bills of lading, nor had said bills of lading ever been read by the cashier of the bank at New Orleans.

The bill of lading delivered to the paying teller of the Louisiana National Bank for the Planter's National Bank, was as follows:

"DOMESTIC BILL OF LADING.

"SOUTHERN EXPRESS COMPANY.—FORWARDERS.

"No. 2, $3,000. JULY 26, 1869.

"Received from *Louisiana National Bank* one package, sealed, and said to contain *three thousand* dolls., addressed to *Planter's National Bank, Louisville, Ky.*, upon the special acceptance and agreement that this Company is to forward the same to its agent nearest or most convenient to destination only, and there to deliver the same to other parties to complete the transportation, such delivery to terminate all liability of this Company for such package; and also that this Company are not to be liable in any manner or to any extent for any loss, damage, or detention of such package, or of its contents, or of any portion thereof, occasioned by the acts of God, or by any person or persons acting or claiming to act in any military or other capacity in hostility to the Government of the United States, or occasioned by civil or military authority, or by the acts of any armed or other mob or riotous assembly, piracy, or the dangers incident to a time of war, nor when occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or steam. The shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained, shall extend to and enure to the benefit of each and every company or person to whom the Southern Express Company may entrust or deliver the above described property for transportation, and shall define and limit the liability therefor of such other company or person. In no event is this Company to be liable for a greater sum than that above mentioned, nor shall it be liable for any such loss unless the claim therefor shall be made in writing at this office, within thirty days from this date, in a statement to which this receipt shall be annexed.

"For the Company. SHACKLEFORD.

"(Signed),

"Freight Coll.

"Issued by Southern Express Company for
to , only except against loss occasioned by the public enemy."

"Insurance, $——."

A similar bill of lading was issued for the Bank ot Kentucky, differing from the foregoing only as to the amount of currency shipped.

The figures and words italicized were in the hand writing of the paying-teller of the Bank at New Orleans, the other portions of the bills of lading being printed.

At the time referred to, the Southern Express Company and the Adams Express Company were publicly engaged in the business of carrying money, currency, bank notes, goods and personal property for hire, from one place to another, particularly over the railroads, owned and operated by other persons and corporations, through Louisiana and Mississippi to Humboldt, Tenn., and thence over the Louisville and Nashville Railroad to Louisville, Kentucky, under a contract, by which they divided the compensation, having relation to the distance the article was transported by each Company. Between Humboldt and Louisville they employed the same messenger or agent.

The Southern Express Company usually transported said packages by railroad as far as Humboldt, and then delivered the same to one Dugan, (who was a messenger of both companies) to complete the transportation to Louisville, and there to make delivery. Dugan placed the packages in a sheet-iron safe, braced with iron bands and weighing about 80 pounds, used by the two Express Companies for the carrying of valuables—not burglar or fire proof, nor intended to be such, but such as was generally used by those Companies for the carrying of valuables. The iron safe was placed by the messenger in an apartment of a car of the Louisville and Nashville Railroad Company, set apart for the use of said Express

Companies, under an arrangement to that effect between the express and railroad companies, to be therein carried to Louisville, Kentucky.

While the packages were in course of transportation to Louisville in said car, the packages being in charge of the messenger, a trestle at Budd's Creek, on the line and part of said railroad, during the night gave way, while the train of cars belonging to and controlled by said railroad company was passing over it. The train, including the express car, was precipitated from the track, and the car containing the express matter, catching fire from the locomotive, was burned, the packages belonging to the plaintiff's in error being also consumed by the fire while in the sheet-iron safe, although the safe itself remained intact. The messenger was rendered insensible by the falling of the car, and remained in that condition until after the express matter was burned up.

It was proven in the trial that some of the timbers in the trestle which broke down, were at the time decayed.

The plaintiff's in error, within due time, made a written demand for their money, denying in the writing containing the demand, that the special conditions contained in the bills of lading constituted any part of the contract for transportation. The Adams Express Company denied its liability for the money, and hence these actions.

A verdict in each case was returned in behalf of the Express Company.

The facts as above given are taken from the various bills of exceptions.

(*Pr: Rec. p. p.* 11 *to* 14.)

STATEMENT OF ERRORS.

1. The *first error* assigned is the action of the Court below in charging the jury, against the objection of the plaintiff in error, as follows:

"If you believe these facts, (those hereinbefore detailed) then the bill of lading thus signed constituted the contract, and all the exceptions in it are a part of the contract, no matter whether each or all of them were known to the Louisiana National Bank or not, and the plaintiff is bound by this contract, whether it expressly authorized the Louisiana National Bank to make it or not."

Plaintiff in error excepted, at the time, to the proposition of law contained in this charge, and now assigns that action of the Court below for error here.

(*Pr: Rec.* 21 *to* 24.)

2. The *second error* assigned is the action of the Court below, in charging the jury against the objections of plaintiffs in error, as follows:

"The evidence tending to show that the bill of lading was not read at the time of the signing, and that nothing was said about the exceptions contained in it, is immaterial."

(*Pr: Rec.* 21 *and* 24.)

3. The *third error* assigned is the refusal of the Court below to charge as indicated in the following instructions asked by plaintiff, viz:

"At common law a common carrier is an insurer of the goods and valuables entrusted to him, and he is responsible for all losses of the same, save such as are occasioned by the act of God or the public enemy; but he may, however, by an express agreement, which is understandingly assented to by the shipper, and which just and reasonable, limit his liability as a common carrier, and the burden is on him to show that he has restricted his common-law responsibility by such a contract."

(*Pr. Rec.* 14.)

"If the jury believe, from the evidence, that the defendant, at the time of the loss of the package in the pleadings mentioned, for the value of which this suit was brought, was publicly engaged in transporting United States legal tender notes, national and other bank notes, fractional and other currency, and other valuables, from one place to another for hire, it was a common carrier, and subject to all the responsibilities of a common carrier, except so far as it may have modified them by an express agreement which was understandingly assented to by the shipper, made at the time of such shipment; and if the jury believe, from the evidence, that the defendants did, in this case, so limit their liability to the plaintiffs, such limit of liability must govern, but that does not relieve defendant and the agencies employed by it in executing its undertakings from ordinary care in the discharge of its and their duties. The burden of proof to show such an express contract is upon the defendant, and the assent to such modifications and restrictions cannot depend upon implication or inference founded on doubtful and conflicting evidence, but the evidence of such assent must be specific and certain, leaving no room for controversy between the parties."

(*Pr. Rec.* 14–15.)

"If the jury believe, from the evidence, that the Southern Express Company, being engaged in the business of transporting money, goods, and other personal property for hire, did, on the 26th July, 1869, receive from the Louisiana National Bank a sealed package, addressed to the plaintiffs, containing the sum of $3,000 00, to be transported to Louisville, Ky., and there delivered to the plaintiffs, the Planters' National Bank; and if they further believe that in the course of such transportation to defendant, The Adams Express Company, being engaged in the like business of transportation, by its messenger

and agent, received said money for the purpose of completing said transportion and making said delivery; and if the further that said money has not been delivered to plaintiff, but was destroyed by reason of the breaking or falling down of a trestle on the line of the Louisville and Nashville Railroad, causing the car in which said money was being carried, while passing over said trestle, to be percipitated from said road, whereby said car, with said money, was burned and destroyed, then the law is for the plaintiff, and the jury must so find, unless they beiieve, from the evidence, that said money was received by the Southern Express Company, under an express agreement between it and the Louisiana National Bank that it was to be transported upon the terms and condition set forth in the printed bill of lading or receipt, read in evidence as part of deposition of Shackeford, and dated July 26th, 1869, in which event the rights of the parties are to be controlled by such terms and conditions as indicated in other instructions given to the jury."

(*Pr. Rec.* 15.)

"In determining whether the Louisiana National Bank expressly agreed to the conditions set out in the printed bill of lading dated July 26th, 1869, the jury are instructed—

1. That the burden of proof in this case is upon the defendant to show that the said bank expressly assented to said conditions as a part of the contract of shipment, intending thereby to relieve said Southern Express Company from responsibility for the loss of said money in the states of case provided for in said printed conditions, and unless such express assent is shown, from all the evidence, the jury must find for the plaintiff.

2. Such express assent must not depend upon implication or inference, founded on doubtful and conflicting evidence, but must be specific and certain, leaving no room for controversy between the parties, before the jury are authorized to find that such assent was given.

3. For the purposes of this case the Adams Express Company is entitled to the benefits and subject to all the responsibilities of any contract or agreement which the jury may, under the instructions find, was made between the Southern Express Company and the Louisiana National Bank."

(*Pr. Rec.* 16).

"The jury are instructed that if they believe, from the evidence, that the Planters' National Bank instructed the cashier of the Louisiana National Bank to ship said sum of $3,000 00 to it by express, and gave no instructions to assent to such conditions as are set out in said printed bill of lading, dated July 26th, 1869, and if they further believe that said cashier instructed the paying-teller to execute said order, and gave him no other instructions in reference to said shipment, then said paying teller had no authority, on behalf of said Louisiana National Bank, or of plaintiff, to assent to such conditions, and they constitute no part of the contract of shipment, unless the jury find from the evidence that subsequent to the receipt of said money by the Southern Express Company, either the said Louisiana National Bank, or the Planters' National Bank, expressly ratified said conditions, and the burden of proving such ratifications is upon the defendant."

(*Pr. Rec.* 17.)

"Although the jury may believe that the Louisiana National Bank expressly assented to the printed terms and conditions set out in the printed bill of lading, dated July 26th, 1869, as part of the contract of shipment of said sum of $3,000 00, the jury are instructed that the blank, as to insurance at the end of said bill of lading constituted no part of said contract, and the knowledge by the officers of the Louisiana National Bank of the different rates of charges upon goods or property insured

or uninsured, or the absence of any intention on the part of said bank officers to insure said money cannot affect said contract or modify said printed conditions."

(*Pr. Rec.* 18.)

4. The *fourth error* assigned is the action of the court below in charging the jury, against the objections of plaintiff in error, as follows:

"Now if you believe that the package was destroyed by fire, as above indicated (i. e. as set out in the foregoing statement), without any fault or neglect whatever on behalf of the messenger or the defendant, the defendant has brought itself within the terms of the exception and is not liable."

(*Pr. Rec.* 25.)

5. The *fifth error* assigned is the action of the court below in charging the jury, against the objections of plaintiff in error, as follows:

"It is not material to inquire whether the accident resulted from the want of care, or from negligence of the Louisville and Nashville Railroad Company and its agents, or not, since the uncontested testimony shows that the car and train, in which the messenger of the Adams Express Company was transporting the package, belonged to the Louisville and Nashville Railroad Company, and was exclusively subject to its control and orders."

(*Pr. Rec.* 25.)

6. The *sixth error* assigned is the action of the court below in charging the jury, against the objections of plaintiff in error, as follows:

"But when the common carrier has limited his liability so as to make himself responsible for ordinary care only, and the

shipper to recover against him is obliged to aver and prove negligence, it must be his negligence, or the negligence of his agents, and not the negligence of persons over whom he has no control."

(*Pr. Rec.* 26.)

7. The *seventh error* assigned is the action of the court below in charging the jury, against the objections of plaintiff in error, as follows:

"If in his employment he (the common carrier) uses the vehicles of others, over which he has no control, and uses reasonable care, that is, such care as ordinarily prudent persons engaged in like business use in selecting the vehicles, and if the loss arises from a cause against which he has stipulated with the shipper, he shall not be liable for the cause, unless it arises from his want of care, or the want of care of his employes."

(*Pr. Rec.* 26.)

8. The *eighth error* assigned is the action of the court below, in charging the jury, against the objections of plaintiff in error, as follows:

"Without, therefore, deciding whether or not the evidence adduced in the case tends to establish any want of reasonable or ordinary care on the part of the Louisville and Nashville Railroad Company, I instruct you that such evidence is irrelevant and incompetent, and that you should disregard it; that is, give no more effect to it than if it had not been adduced."

(*Pr: Rec.* 26.)

9. The *ninth error* assigned is that the action of the court below in refusing to charge the jury as indicated in the following instructions asked by plaintiff in error, viz:

"If the jury believe from the evidence, that the Southern Express Company was, on the 26th day of July, 1869, engaged in carrying, for hire, from one place to another, packages of money, United States Treasury legal-tender notes, national and other bank notes, fractional and other currency, and other valuables, whether in its own or the vehicles of others; and that whilst so engaged, said company on the 26th of July, 1869, received at New Orleans, from the Louisiana National Bank, a sealed package, addressed to plaintiff, containing $3,000.00, to transport the same to Louisville, Ky., by itself and the defendant, and then to be delivered to plaintiffs by defendant, there being a business arrangement or usage for such transportation between the two companies, and that said package was so received by said Southern Express Company upon an express contract made at the time with said Louisiana National Bank that said transportation and delivery should be executed upon the terms and conditions set out in the bill of lading or receipt attached to the deposition of Shackleford, dated July 26, 1869, and read in evidence; and that, in the course of such transportation, said package came into the possession of the defendant, or its messenger, or a joint messenger of said Southern and said Adams Express companies, to complete the transportation and delivery thereof upon the terms of said receipt or bill of lading, and in accordance with business arrangements between the two said companies, the said defendant being at the time engaged in the like business of transportation for hire; and such package, being in the custody and control of such agent, was by him, in order to complete the transportation and delivery thereof, placed in one of the cars of the railroad known as the Louisville and Nashville and Great Southern Railroad company, set apart under an arrangement between said railroad company and said express companies, or between it and defendant, for the goods, money, valuables and other property transported by said companies, or by defendant, on said road; and that whilst said package was being so transported, a por-

tion of the trestle work of said road at or near Budd's Creek fell, and was crushed as the car in which said package was carried was passing over the same, by which the same was lost; then the burden of proof is upon the defendant to show that the breaking or falling of said trestle could not have been avoided by reasonable care and diligence on the part of said agents, servants and employes of said railroad company having charge, oversight, and control of said road, cars and trestle; and unless it so appears from the evidence, the jury must find for the plaintiff's the sum of $3,000.00, and may, in their discretion, give interest on said sum from the time that plaintiffs demanded said package and its contents of defendant."

(*Pr. Rec*, 15-16.)

"If the jury believe from the evidence that there was on the 26th of July, 1869, a business arrangement existing between the defendant and the Southern Express Company, by which express matter shipped from New Orleans to Louisville was to be carried partly under the charge of the latter company and partly by the defendant, the compensation therefor to be prorated between them, and that the package in question was received for transportation, by said Southern Express Company on the 26th of July, 1869, to be transported as aforesaid from New Orleans to Louisville; and the same was transported under such agreement by said company, and defendant on the railroad known as the Louisville and Nashville and Great Southern Railroad, upon the terms and conditions of the receipt dated July 26, 1869, attached to Shackleford's deposition, in a car of said road set apart under an arrangement between said road and said express companies, or either of them; and whilst being so transported, a portion of the trestle work of said road fell, or was crushed, as the car on which said package was being carried was passing over the same, whereby said package was lost, then the burden of proof is upon the defendant to show that the breaking and

falling of said trestle could not have been avoided by reasonable care and diligence on the part of the agents, servants and employes of said railroad company having charge, oversight, and control of said road and trestle. And unless it so appears from the evidence, the jury must find for the plaintiffs the sum of $3,000.00, and in their discretion may give interest on said sum from the time that plaintiffs demanded said package and its contents of defendant."

(*Pr. Rec.* 16.)

"That the defendant is liable for the negligence or the want of ordinary care of the Louisville and Nashville and Great Southern Railroad Company, in keeping its track, bridges, &c., in order, while plaintiffs' package of legal tenders was being transported over said company's road, and although the burden of proving negligence in this respect is on the plaintiffs, yet the jury may, from the fact of the falling of the trestle, as proven in this case, presume negligence upon the part of said company and defendant, and in the absence of satisfactory evidence showing that ordinary care was used by said company in and about the said trestle which fell, the jury should find for the plaintiff."

(*Pr. Rec.* 18.)

"Although the jury may believe, from the evidence, that the money contained in the sealed package, delivered in the Louisiana National Bank to the Southern Express Company, was destroyed by fire, and that that fire was caused by the falling or breaking of a trestle on the line of the Louisville and Nashville Railroad, whereby the car in which said money was being carried was precipitated from said road, and set on fire from the engine, and said money consumed, and although the jury may further believe that the Louisiana National Bank at the time of the shipment of said package expressly assented to the printed

terms and conditions set forth in said printed bill of lading, dated July 26th, 1869, said loss cannot be deemed to have been occasioned either by the dangers of railroad transportation or by fire within the meaning of said bill of lading, unless it appears from the evidence that the breaking of said trestle and the falling of said cars could not have been avoided by the exercise of reasonable care and diligence by the agents, servants and employes of said road, then and there engaged in and about the control and management of said cars, road and trestle."

(*Pr. Rec.* 18.)

10. The *tenth error* assigned is the action of the court below in charging the jury, against the objections of the plaintiff in error, as follows:

"But if the safe was such as prudent persons engaged in like employment generally use for the purpose, there was no want of care, and the defendant is not responsible for want of care in this particular."

(*Pr. Rec.* 27.)

11. The *eleventh error* assigned is the refusal of the court below to charge the jury, as indicated in the following instruction asked by plaintiff in error, viz.:

"If the jury believe, from the evidence, that the currency, $3,000 00, was shipped by the Louisiana National Bank on the 26th July, 1869, to the plaintiff upon the terms set out in said bill of lading, of that date, and was received by a messenger of the Adams Express Company, or by a joint messenger of the Adams and Southern Express Companies, to complete the transportation of same to plaintiff, said Adams Express Company, being at the time engaged in the business of transporting money, currency, and personal property, for hire, it was the duty of such messenger to take reasonable care and precautions to guard

said currency against destruction by fire while in his custody in the course of transportation, and if the jury believe that said currency, when destroyed by fire, was kept by said messenger in a sheet-iron safe, and that said iron safe was not reasonably sufficient to protect said currency against fire, and if they further believe said currency could have been protected against said fire, by reasonable care and precautions on the part of said express messenger, then the law is for plaintiff, and the jury should so find."

(*Pr. Rec.* 18.)

POINTS.

I.

While the right of the carrier to contract for a reasonable limitation of his responsibility can not be disputed, it is equally clear that such responsibility can not be restricted or qualified unless the carrier "*expressly stipulates* for the restriction and qualification." (*York Co. vs. Central R. R.*, 3 *Wall.* 113.)

"The exemption from these duties should not depend upon implication or inference, founded on doubtful and conflicting evidence; but should be specific and certain, leaving no room for controversy between the parties." (*New Jersey Steam Nav. Co. vs. Merchants Bank*, 6 *Howard*, 383.)

The cases in 6 Howard and 3 Wallace were cited and approved in *Railroad Co. vs. Manufacturing Co.*, 16 *Wallace*, 329, where that court says:

"It is not only against the policy of the law, but a serious injury to commerce, to allow the carrier to say that the shipper of merchandise assents to the terms proposed in a notice, whether it be general to the public or special to a particular person, merely because he does not expressly dissent from them."

It seems to us that these principles were disregarded by the court below in that portion of the charge to the jury which relates to the contract of shipment between the parties. It will be observed that nothing was *said*, at the time of shipment, about the conditions and exceptions in the bill of lading, which, if part of the contract of shipment, would qualify the common law liability of the carrier. The parties were silent, on the occasion of the shipment, as to such conditions and exceptions. The court below refused to instruct the jury that there must be an express contract or stipulation between the parties before the responsibility of the carrier could be considered as restricted and qualified. It was in evidence that the attention of the paying teller was never called to the printed conditions and exceptions upon

any occasion when he delivered packages to the Express Company. It was proven that the cashier of the Louisiana National Bank had never read the bills of lading. But because the cashier of the bank was aware of the different rates charged by the Express Company, and because the paying teller filled up a blank bill of lading, and received it from the express agent, after the latter had signed it,—nothing being said at the time about the conditions and exceptions in the bill of lading—the court, as matter of law, held those exceptions and conditions to be a part of the contract, whether the shipping bank had or not knowledge of the nature of the conditions and exceptions. Although the authorities require an express contract between the parties before giving the carrier the benefit of any restrictions and limitations of his common law responsibility, the court below seemed to think that knowledge by one of the contracting parties of the nature or extent of such restrictions and limitations, was wholly immaterial. We do not understand how the shipper can be held as making an express contract, without having knowledge of its terms, or without intending to become a party to such contract. We submit that the court, in its charge to the jury, *inferred* an express contract, *from the silence of the parties*—a result which this court has said was prohibited by the highest considerations public policy.

If an express contract could be inferred or presumed from the facts proven, such inference was to be drawn by the jury, and the court should not, as matter of law, *require* the jury, from the facts proven, to presume an express contract.

Adams Express Co. vs. Haynes, 45 *Ill.*, 89.
Judson vs. Western R. R. Co., 6 *Allen*, 486.
American Mer. Union Ex. Co. vs. Schies, 55 *Ill.*, 150.

The suggestions under this head apply as well to the refusal of the court below to instruct the jury, as indicated in the third assignment of error, as to those portions of the charges to the jury which are referred to under the first and second assignments of error.

II.

The managers and employes of the Louisville and Nashville Railroad Company were, in legal contemplation, for the purposes of transportation, the agents and servants of the Express Company.

The ground of this suit is the breach of the contract by which the common carrier, defendant, undertook to carry and deliver to plaintiffs a package of money. The money was burned while being carried in a car of the Louisville and Nashville Railroad Company, in which defendant had placed the same for carriage —the road being paid by defendant for use of its car.

Defendant claims that it is not liable for said breach of contract, even if there was negligence in the carriage of the money by the Railroad Company, which occasioned the loss of it. Because—

First—The receipt upon which it was carried by defendant exonerated it from any loss or damage to said package occasioned "by the dangers of railroad transportation, * * only fire * * "; and that said package was, without any fault on its own part, lost by one or both of said excepted causes.

Second—That defendant had no control or management over the railroad company or its servants—that it was an independent carrier—and was not the servant, agent or employe of defendant in executing the contract of carriage of said package.

Plaintiffs contend that the receipt did not relieve defendant from liability for loss occasioned either by its own, or the negligence of those employed by it in transacting its business and contract to carry and deliver the money—that such a contract

would be void—that the Louisville and Nashville Railroad Company was the servant and employe of defendant in executing said contract, and if guilty of negligence by which the contract was broken, defendant is responsible for the breach of contract so occasioned.

A common carrier does not cease to be such, because he has limited his liability by a special contract. Notwithstanding such special contract he remains a common carrier. (*Davidson vs. Graham*, 2, *Ohio St.*, 140.) In that case the court said:

"It has been held that when the liability of a common carrier has been restricted by agreement, he is to be regarded in respect to that particular transaction, as not in the exercise of his public employment, but as an ordinary bailee for hire, and therefore only liable for a neglect of ordinary diligence. The reason upon which this opinion rests is not satisfactory,"—and the court declared that the character of employment was not changed by the special contract in that case, but the carrier was still a common carrier.

In *Railroad Company vs. Lockwood* 17, *Wall* 376-378, it is held (*arguendo*) that a common carrier does not cease to be such because he has limited his liability by a special contract. Notwithstanding such special contract, his employment and character of common carrier continue. (See also *Hooper, Wells, Fargo & Co.*, 27 *Col.* 11. *Christenson vs. Am. Ex. Co.*, 15 *Minn.*, 270), to the same effect.

Now we argue—That even admitting that the bill of lading shown in this case was the contract between plaintiffs and defendant, and defendant was not to be liable for the loss of the package, "by dangers of railroad transportation, ocean or river navigation, or fire or steam," not caused by his negligence; still, the defendant was a common carrier of said package, but with a limited liability. He did not by reason of such special contract

become an ordinary bailee or private carrier for hire of the money.

The distinguished Judge before whom the case was tried in the lower court, admitted that the Express Company did not change its character of common carrier by reason of the special contract shown in the case—but the court held it only to the liability of an ordinary bailee or private carrier for hire. Then, if the express company continued to be a common carrier of said money, and exercising its public employment in that respect, we think that it must be true, that all of its common law liabilities, except so far as they were excepted in the contract, still rested upon it; and there being no exception in the contract for loss occasioned by the fault of the servants or agencies employed or used by defendant in the execution of its agreement to carry and deliver said package to address—and the Louisville and Nashville Railroad having been employed and used by the defendant in executing said contract—and defendant being by the common law responsible for the negligence and acts of its servants, and the agencies used or employed by it in the transaction of its business—the defendant continued to be bound as at common law for any negligence ascribable to said Railroad Company.

We therefore say, that if there was any negligence on the part of the Louisville and Nashville Railroad in transporting said money, which occasioned loss to plaintiffs, even though there was none on the part of Dugan, the joint messenger of the two companies, the defendant was liable to plaintiffs for such loss.

There was evidence of negligence on the part of the Louisville and Nashville Railroad. Besides the breaking down of the trestle and wreck of the train, there was evidence that some of the timbers of the trestle, on the south end of the break, seemed to be decayed.

(See *Bill. Ex. No.* 5 *p.*)

The phrase, "dangers of navigation," has the same meaning and effect as "dangers of the seas."

Parsons on Shipping and Adm., Ed. of 1869, *vol.* 1, *p.* 253, and the cases there quoted. "Dangers of railroad transportation" will be similarly construed, we suppose.

If a loss occurs by a peril of the sea, which might have been avoided by the exercise of any reasonable skill and diligence at the time when it occurred, it is not to be deemed, in the sense of the phrase, such a loss by the "perils of the sea," as will exempt the common carrier from liability; but rather a loss by the negligence of the party.

(*Schooner Riverside*, 2 *Sum. R*, 571. *Story on Bailm., Sect.* 512.)

If, therefore, there was negligence on the part of the Louisville and Nashville Railroad Company whilst carrying said money for defendant, as to the condition of its road and trestle, it can not be said that the loss was occasioned by the "dangers of railroad transportation," if such loss be caused by such negligence.

A common carrier will not be permitted to stipulate for immunity for his own negligence, or for that of his servants or agents, even though he can exercise no control over their actions.

In the case of *Ashman vs. The Penn. and R. W. Co.*, 4 *Dutcher* 180, the Supreme Court of New Jersey said, that although it was competent for a carrier to stipulate for exemption from his extreme common law responsibility, he could not by such contract discharge himself from responsibility for the consequences of his own fault, or that of his servants.

In *Railroad Company vs. Lockwood*, 17 *Wall.* 377–378, the court said:

"But it is contended that though a carrier may not stipulate for his own negligence, there is no good reason why he should not be permitted to stipulate for immunity for the negligence of his servants, over whose actions, or his absence, he can exercise no control. If we advert for a moment to the fundamental principles on which the law of common carriers is founded, it will be seen that this objection is inadmissible." And having

then referred to the objects of the law in regulating the duties and responsibilities of common carriers, the court proceeded to say :

"Now to what avail does the law attach these essential duties to the employment of the common carrier, if they may be waived in respect to his agents and servants, especially when the carrier is an artificial being, incapable of acting except by servants and agents. It is carefulness and diligence in performing the service which the law demands, not an abstract carefulness and diligence in proprietors and stockholders, who take no active part in the business. To admit such a distinction in the law of common carriers, would be subversive of the very object of the law." *See also Christenson vs. Am. Ex. Co.*, 15 *Minn.*, 281, *W. W. Welch vs. Boston & Albany R. R. Co., decided by Sup. Court of Errors of Connecticut, and reported in Am. Law Reg., vol.* 15, *March*, 1876, *No.* 3, *p.* 140.

But in this case, it was held by the court below, that the Louisville and Nashville Railroad Company was not the servant or agent of defendant in transporting the money ; and it was so held upon the ground that the railroad was entirely independent, and that defendant had no control whatever over it or its servants.

This point has been substantially settled against the ruling of the lower court in the following cases, viz.: *Hooper vs. Wells, Fargo & Co.*, 27 *Col.*, 11 ; *Christenson vs. Am. Ex. Co.*, 15 *Minn.*, 270, *and Buckland vs. Adams Ex. Co.*, 97 *Mass.*, 124, seems to be the same way.

In the case of *Hooper vs. Wells, Fargo & Co.*, the defendant was an express company engaged in the business of receiving, forwarding, carrying and delivering by sea and by land, for any one who employed them, treasure, and in care of their own messenger, in vessels, conveyances and vehicles owned by others, and ordinarily used by the public at large, in the common and public mode of transportation and conveyance.

On the 21st of April, 1863, the plaintiff delivered, at Los Angeles, to the agent of defendants, a package of gold bullion, to be transported to San Francisco, in consideration of $——, and on its delivery, plaintiff received and accepted from said agent, a printed and written receipt. In said receipt was this clause:

"It is further agreed, and is part of the consideration of this contract, that Wells, Fargo & Co. are not to be responsible, except as forwarders, nor for any loss or damage arising from the *dangers of railroad, ocean or river navigation, fire or steam,* unless specially insured by them, and so specified in this receipt."

One of the usual modes of conveyance between Los Angeles and San Francico was by stage coach to San Pedro, and from San Pedro by ocean steamer.

At San Pedro, the usual means of transporting goods, &c., between the shore and the steamer (which on account of shoal water lay off about three miles) was by means of the steam tug "Ada Hancock."

A messenger of the company usually went from the shore to the steamer, with the express treasure in charge, on said tug. The package of gold bullion, with other treasure, was, at San Pedro, placed on the tug to be placed on the steamer to be transported to San Francisco.

The tug blew up between the shore and the steamer, and the messenger was killed and the bullion lost.

There was evidence tending to prove that the explosion was caused by carelessness of the engineer and other officers of the tug.

Defendants had no interest in the tug and no control over her management or navigation.

It was held by the court, that the express company was responsible for loss occasioned by the negligence of the employes of a steamboat owned and controlled by other parties than the expressman, but *ordinarily used by him in his business as a*

means of conveyance, notwithstanding a clause inserted in the receipt for the goods that he was not to be responsible, except as forwarders, nor for any loss or damage arising from the dangers of railroad transportation, ocean or river navigation, fire or steam, unless specially insured. The court thought that the contract did not evince a clear intention that defendants should be exonerated from any loss resulting from negligence in the agencies employed by them in the transportation of the treasure. The question as to the power of a common carrier by special contract to exonerate himself from liability arising from the negligence of those employed by them in their business was raised. The court said:

"For defendants purposes, the managers of those various conveyances were their agents and employes. * * * That defendants, although employing public conveyances, were still common carriers, having the actual custody and management of the treasure during the transit, as well as while it remained at the office of defendants at the extremities of their routes."

The case in 27 *Cal.* is referred to and approved in *Redfield on Carriers, sec.* 56, *note* 27.

In the case of *Christenson vs. American Express Company*, there was a receipt in which the company agreed to deliver the goods at Mankato, perils of navigation and transportation, fire, &c., excepted, and it was agreed as part consideration of the contract, that the company were not to be held liable for any loss or damage, except as forwarders.

The goods were lost in course of transportation, by the sinking of a steamer on the Mississippi river, on which they had been placed.

The referee found that there was negligence on the part of the officers of the steamer, and

The court held that the steamer was an agent employed by the company in the transportation of the goods, and, notwithstanding the exceptions contained in the receipt, held the company liable for the negligence of the officers of the steamer.

The court said:

"The clause of the receipt by which it is provided that the defendants are not to be held liable for any loss or damage, except as forwarders only, does not have the effect to limit the responsibility of defendants to that of mere forwarders. They must be regarded as common carriers. *Their contract is to carry the goods*, and having entered into the contract they are not to be permitted to say that they shall not be responsible for the negligence of themselves, *or of the agencies employed by them in its performance*, though they may be special agreement, modify and limit their common law liability as insurers of the goods."

Again the court said:

"And although the defendants' liability at common law as a common carrier and insurer of goods is modified by other provisions of the receipt, as will possibly in some respects by the clause under consideration (the clause as to liability as forwarders), it is not so far modified by either as to exempt the defendants from responsibility for their own negligence, *or the negligence of the agents employed by them in the transportation of the goods.*"

We think it quite immaterial (and these cases sustain us) whether the carrier has control or management of the conveyances by which his contracts of carriage are executed. *His contract is to carry and deliver safely. Redfield on Carriers, sec.* 56. There is no restriction as to the mode or the means by which he discharges his duty. There is nothing in the usual contract of carriage requiring him to carry, under his own immediate control, or that of servants under his immediate control; and he does not so undertake at common law. He may use his own, or the vehicles and conveyances of others, the public and usual conveyances of the country, just as he pleases. Whether he shall carry in the one way or the other, forms no part of the contract of carriage. He is responsible for any breach of his

contract, whether the fault of himself or his servants or agencies employed by him in its execution, whether under his control or not. The strict liability placed by the common law upon common carriers is founded in public policy. The relaxation of these rules have been very reluctantly conceded, and some of the courts still adhere very closely to the ancient law of common carrier liability.

All special agreements restricting this liability must be reasonable and freely and understandingly assented to by the shipper; there must be no conflicting or doubtful evidence of such a contract between the parties; the contract must be express, either in parol or in writing, as is said in the *New Jersey St. Nav. Co. vs. Merchants' Bank.*

We know of no case in which the court has held that a common carrier who uses the public conveyances of the country in executing his contracts of carriage, and over which he has no control, may by special agreement exempt himself from liability for the negligence of such agents and employes. The cases we have referred to do not encourage any such idea—but we think are clearly against any such contract—and in the case of the Michigan Central Railroad Company vs. the Mineral Springs Manf. Co., decided at the December term, 1872, reported in 16 *Wallace*, 330, the court said:

"The law in conceding to carriers the ability to obtain any reasonable qualifications of their responsibility by express contract, has gone as far in this direction as public policy will allow."

We think that there are as many and as cogent reasons for applying the rules of the common law to express carriers as to others, and as little ground for relieving them. The circumstances under which the special contracts are made with them are the same—the necessity of immediate carriage of the goods is generally urgent, and they have a substantial monopoly of the business.

If public policy would allow express carriers to be relieved from responsibility for negligence on the part of the agencies employed by them to transport the property entrusted to them for delivery, it is sufficient in this case to say that the parties here did not contract for any such exemption on the part of the carrier. The bill of lading, according to any fair construction of it, contains no such condition or exception.

In view of the authorities, and upon general principles, we contend that the lower court erred in telling the jury that the defendant was not responsible for the negligence of the Louisville and Nashville Railroad Company, and in excluding as wholly immaterial the evidence of such negligence from their consideration.

III.

Upon the trial below, a question arose as to whether the express company exercised proper care for the safety of the currency when it placed it in a sheet-iron safe, which was not fireproof, and was not intended to be.

Even if the bill of lading constituted the contract between the parties, it was the duty of the carrier to take proper precautions to protect the currency against destruction by fire. What were proper precautions?

If the sheet-iron safe was not reasonably sufficient to protect the currency against fire, and if the carrier could have protected the currency against fire by reasonable care, then the law is against the carrier, but the court below refused to so instruct the jury.

(*Pr. Rec.* 18.)

The jury were instructed, in substance, that the express company was only bound to such care as prudent persons *in such business generally use* in the transportation of currency.

(*Pr. Rec.* 27.)

The court below may not have intended to announce any different proposition from that contained in the instruction asked by plaintiffs in error, but it is evident that the jury were misdirected upon this branch of the case, by the language of this charge.

The precautions express carriers generally take in the transportation of currency, do not, we submit, constitute the test for determining whether proper diligence has in fact been observed by such carriers. They should, without reference to any custom in their business, observe that degree of diligence which the nature of the case demands, and which was reasonably necessary.

The custom of carriers cannot, consistently with public policy, be allowed to establish the degree of diligence which they should observe in reference to property entrusted to them for transportion. To admit that doctrine is to subordinate the legal duty to the mere customs of carriers.

IV.

The instructions which the plaintiffs in error asked, and which were refused by the court below, present some propositions of law which, in the event of a reversal of the judgment and another trial should be passed upon by this court.

If this court should hold that the managers and employes of the Louisville and Nashville Railroad were, for the purposes of transportation, the agents and servants of the express company, and, consequently, that the latter was responsible for the negligence of the former, then the important question arises, as to how far the plaintiff in error must go in order to make such negligence manifest.

It appeared in evidence that the fire was directly caused by the breaking of a trestle on the line, and a part of the Louisville and Nashville Railroad Company.

Although, as a general proposition, negligence must be established by the party whose right rests upon the existence of

such negligence, still when the above recited facts appeared in evidence, a *prima facie* case of negligence was then established, and the burden of proof was, in a certain sense, shifted upon defendant in error.

It then became the duty of the defendant in error to show affirmatively that the breaking or falling of said trestle could *not* have been avoided by reasonable care and diligence on the part of the agents, servants and employes of the railroad company, having charge, oversight and control of said road, cars and trestle.

These views are fully sustained by numerous authorities.

A leading case upon this point is *Salstonstall vs. Stockton*, *Taney's Circuit Court Decisions*, 12.

In that case, the plaintiff sued the proprietors of a line of stage coaches for damages sustained by his wife, through the upsetting of one of their coaches. Chief Justice TANEY held that after proof by the plaintiff that the carriage was upset, and the wife injured, it was "incumbent upon the defendant to show that proper skill and care were exercised on their part, and that the injury was not produced by the negligence of the driver." The burden of proof, he said, was upon the party "who has peculiar means of knowledge not within the reach of his adversary," the only exception to the rule being "where the existence of the fact in controversy would make the party who is presumed to have the knowledge liable to a criminal proceeding." In that case it was also argued that the rule just related required the party to establish a negative. But to this Chief Justice TANEY replied: "It is not a negative that they are required to prove, but an affirmative proposition, that is to say, that proper care and skill were employed; and to show how the accident happened *without any fault on their part.*" * * *

The same rule of evidence as to negligence must prevail in relation to every carrier of passengers, whether by stage coaches conducted by horse power, or on steamboats, or railroad cars driven by steam.

That case was affirmed in 13 *Peters*, 181.

The doctrine of that case cannot be denied, in its application to this case, because it related to passengers and not to goods, transported by the carriers.

The contract of defendant in error was to carry and deliver the currency, and every consideration of policy demands that they should show affirmatively that the failure to deliver was without any fault on the part of themselves or their agents, or servants whom they use in completing the transportation. The breaking of the trestle, and the fire directly caused by it, shows that the currency was destroyed, but the carrier must go farther and show that it was caused without any fault on the part of his agents, the railroad company. When that is shown the loss will then, and not before, appear to have been occasioned by the dangers of railroad transportation.

To the same effect are the following authorities:

Angell on carriers (*4th edit.*), *sec.* 202.
Ewart vs. Street, 2 *Bailey*, 161.
Tamey vs. Wilson, 7 *Yerg.*, 340.
Whitesides vs. Russell, 8 *Watts. & S.* 44.
Dunseth vs. Wade, 2 *Scam.*, 288.
McManus vs. Lancashire, *R.* 4, *H. & N.*, 327.
Alden vs. Pearson, 3 *Gray*, 342.

In *Redfield on Carriers*, *sec.* 60, it is said that the carrier may, by express contract, limit his liability, but "this will not extend any protection to the carrier against any default or misconduct, either of himself or his servants. *And unless it appears* that the damages occurred from the excepted risks, *and without the fault of the carrier, he will be held responsible.*"

The author refers to these cases:

Czech vs. Gen. St. Nav. Co., *Law. Rep.* 3 *C.*, *P.* 14.
Newborn vs. Just, 2 *C. & P.* 76.
American Ex. Co. vs. Sands, 55 *Penn. St.*, 140.

Upon this branch of the case, we refer the court to the lead-

ing case of *Curtis vs. Rochester and Syracuse Railroad Co.*, 18 *N. Y.*, 536, where this rule is presented:

"Whenever it appears that the accident was caused by any deficiency *in the road itself*, the cars *or any portion of the apparatus* belonging to the company and *used in connection with its business*, a presumption of negligence on the part of those whose duty it was to see that everything was in order, immediately arises; it being extremely unlikely that any defect should exist of so hidden a nature that no degree of skill or care could have foreseen or discovered it."

Plaintiffs in error certainly cannot claim a more liberal rule than this. When, therefore, it appeared in proof that the fire was caused by the breaking and falling of a trestle—"a deficiency in the road itself"—a presumption of negligence immediately arose, which could be removed only by showing that the accident could not have been avoided by proper skill and diligence.

In these propositions, the court below did not concur, and we respectfully ask the direction of this court, in the event of a reversal and another trial.

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Counsel for Plaintiffs in Error.

Supreme Court of the United States.

PLANTERS NATIONAL BANK, *Plaintiffs in Error,*
vs.
ADAMS EXPRESS COMPANY, *Defendants in Error.*

BANK OF KENTUCKY, . . . *Plaintiffs in Error,*
vs.
ADAMS EXPRESS COMPANY, *Defendants in Error.*

BRIEF FOR DEFENDANTS IN ERROR.

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Courier Journal Print, Louisville.

transportation had elapsed, and that the said packages were destroyed *by fire*. The said packages contained United States currency; in the one there was $3,000, and it was addressed to the Planters National Bank at Louisville, in the other there was $—— and it was addressed to the Bank of Kentucky at Louisville, Kentucky.

2. The defendants admit the receipt of the packages and their agreement to transport, they admit the destruction of the packages *by fire*, they deny the fact that the packages were received by the defendants on their common law liabilities as *common carriers*, and they insist that on the delivery of the said packages to these defendants, by the paying teller of the Louisiana National Bank, the said Bank and the defendants entered into a special contract with reference to the transportation of said packages by the defendants issuing to and the said Bank *receiving and accepting* certain domestic bills of lading containing the terms on which the said packages should be transported; and that such bills of lading constituted the only contract with reference to the transportation of said packages entered into between the plaintiffs and the defendants. A copy of the said bills of lading is in the record, page 12. In the body of the bills of lading it is provided, *inter alia*, as follows:

"This company are not to be liable in any manner or to any extent for any loss or damage or detention of such package or its contents, or of any portion thereof occasioned * * * * by the dangers of railroad transportation * * * or by *fire*."

The evidence shows that while the package was being

transported on a railroad train from New Orleans to Louisville the car containing the said package and the package itself were destroyed by *fire*, without any fault or neglect on the part of the messenger having charge of the package. See record, page 12.

The evidence shows that the Louisiana National Bank had in its possession blank bills of lading then used by the Southern Express Company showing the conditions and exceptions upon which the Company would transport express matter, and in the margin of such bills was a blank showing that the said Company would insure against all loss except that occasioned by the public enemy; that the Southern Express Company charged a less rate for transporting articles on the conditions and with the exceptions in the bill of lading in question than when they insured against all loss except that occasioned by the public enemy. See R. 12.

The evidence further shows that the Louisiana National Bank was aware of these regulations of the Southern Express Company, that with the said blanks in its possession, the paying teller filled up the bills of lading in question and presented them to the Southern Express Company at New Orleans, and they were signed by its agent, Shackelford, and was by him delivered to said paying teller who at the same time delivered to said express agent sealed packages containing the money sought to be recovered. Record, page 13.

The evidence tends to show that both the cashier and teller of the Louisiana National Bank had knowledge of the conditions and exceptions in said bills of lading. Record, pages 12 and 13.

POINTS.

I.

The right of a common carrier to limit, by special contract, their common law liability, is fully settled by the decisions of this court.

Express Company vs. Caldwell, 21 *Wallace*, 267; *York Company vs. Central Railroad*, 3 *Wallace*, 107; *Railroad Company vs. Lockwood*, 17 *Wallace*, 357; *New Jersey Steam Navigation Company vs. Merchants' Bank*, 6 *Howard*, 344.

II.

The bill of lading, executed by the defendants, and received by the plaintiffs' agent without objection, when he delivered the packages into the custody of the defendants, was evidence of the contract entered into between them; and the defendant must be regarded as undertaking, and the plaintiff as agreeing, that the packages were to be carried upon the conditions therein expressed.

Bills of lading, similar to the one in question accepted by the shipper, have been held valid contracts in the following cases:

Brooman vs. American Express Company, 21 *Wisconsin*, 152.

Grace vs. Adams Express Company, 100 *Massachusetts*, 505.

York Company vs. Central Railroad, 3 *Wallace*, 107.

Railroad Company vs. Androscoggin Mills, 22 *Wallace*, 595.

Meyer, Agent, vs. Harden's Express Company, 24 *Howard, Pr.* 290; *Railroad Company vs. F. and M. Bank*, 20 *Wisconsin*, 123; *Parsons vs. Monteath and Hazard*, 13 *Barbour* 353; *Dorr vs. Steam Navigation Company*, 2 *Comstock*, 207; *Wells vs. New York Central Railaoad Company*, 24 *New York*, 180.

III.

It is no defense to the plaintiffs, against the provisions of the bill of lading, that they did not read the contract.

The evidence shows the blank bills of lading of the Express Company in the possession of the Louisiana National Bank, and that the cashier and teller had a substantial knowledge of the different conditions and exceptions, and that those officers selected the bill of lading by which the package would be carried at the least expense by the Express Company, and the paying teller of the bank presented the contract, ready for signature, on which he wished the money carried.

But whether he, or any of the officers, read the bill of lading or not, it is still the contract.

Of such a contract, the court, in *Brooman vs. American Express*, 21 *Wisconsin*, 152, says, "the contract being shown in the custody of the plaintiff, a due and proper delivery of it to him, and his assent to its terms, are to be presumed, and the burden is thrown on the plaintiff to obviate these presumptions by proof."

In the case of *Meyer, Agent, vs. Harden's Express Company*, 24 *Howard, Pr.* 290, the plaintiff had a receipt book of the defendants in their store, from which the receipt in question was adopted by them, and, without any

application on the part of the defendants, it was filled up and given to the driver of the defendants, and signed by him. The court says "that it was wholly immaterial whether *the attention* of the book-keeper of the plaintiffs was called to the printed matter in the receipt or not."

In the case of *Hopkins vs. Wescott's Express Company*, 6 *Blatchford*, 64, the court says, "It can make no difference that the plaintiff did not choose to read it (the bill of lading) until after he had noticed that the trunk was lost. He received it at the time he parted with the trunk; it was legibly printed, and he must be charged with actual notice of its contents."

In the case of *Grace vs. The Adams Express Company*, 100 *Mass.*, 505, which was an action against the Express Company *as common carriers*, for the loss of certain goods delivered at Wilmington, to be carried to Taunton, Mass., the bill of lading issued by the defendant and accepted by the plaintiff, contained a clause exempting the defendant from loss arising from accidental fire, the dangers of the sea, &c. The goods were lost at sea by the accidental burning of the steamer transporting said goods. Mr. Justice Colt in delivering the opinion of the Court said:

"It is claimed here that the shipping receipt, or bill of lading, constituted a valid and binding contract between the parties; and that upon the loss at sea, of the plaintiff's package, in the course of its transportion under the contract, by an accidental fire, the defendants are discharged from any obligation to the plaintiff in regard to it; and the Court are of the opinion that this claim must be sustained. The receipt was delivered to the plaintiff

as the contract of the defendants. It is in proper form. The terms and conditions are expressed in the body of it, in a way not calculated to escape attention; and the acceptance of it by the plaintiff, at the time of the delivery of his package, without notice of his dissent from its terms, authorized the defendants to infer assent by the plaintiff. It was his only voucher and evidence against the defendants. It is not claimed that he did not know when he took it, that it was a shipping contract, or bill of lading. It was his duty to read it; and the law presumes, in the absence of fraud or imposition, that he did read it, or was otherwise informed of its contents, or was willing to assent to its terms without reading it. Any other rule would fail to conform to the experience of all men. Written contracts are intended to preserve the exact terms of the obligation assumed, so that they may not be subject to the chance of a want of recollection or an intentional mistatement. The defendants have a right to this protection, and are not to be deprived of it by the willful or negilgent omission to read the paper."

In *Rice vs. Dwight Manufacturing Co.*, 2 *Cush.*, 87, which was an action *indebitatus assumpsit* to recover for work done, the defense was that the work was performed under a special contract; and a paper of printed regulations was shown to have been given to and accepted by the plaintiff as containing the terms of the contract, *but which was not signed by either party.* The plaintiff denied knowledge of its contents; but the Court held that where a party enters into a written contract, in the absence of fraud, he is conclusively presumed to understand its terms

and legal effect, and to consent to them. Judgment was therefore for the defendant. See *Railroad Company vs. Androscoggin Mills*, 22 *Wallace*, 595.

IV.

The defendants were common carriers and as common carriers made the special contracts in question, by which contracts they exempted themselves from liability for any loss or damage to the packages occasioned by the dangers of railroad transportation, *or by fire or steam*. Although the defendants remain common carriers they have limited their liability to that of an ordinary bailee for hire, in reference to the particular limitations in the contract. In this case the loss was *by fire*,—the defendants are not responsible if they used ordinary diligence and were not guilty of negligence or want of ordinary care. It is not insisted that their servant, the messenger, is chargeable with any neglect or want of care. For a loss by *fire*, the contract provides that the defendants shall not be liable, and as neither the defendants nor their servant, the messenger, was wanting in care, they are not responsible for the loss.

R. R. Company vs. Lockwood, 17 *Wallace*, 357.

York Company vs. Central R. R., 3 *Wallace*, 107.

N. J. Steam Navigation Company vs. Merchants' Bank, 6 *Howard*, 382.

Dorr vs. Steam Navigation Company, 1 *Kernan*, 490.

Meyer, Agent, vs. Harden's Express Co., 24 *Howard, Pr.* 290.

V.

No negligence is imputed to the express messenger whatever except in the use of the sheet-iron chest to

carry valuables. To this we have only to say that it is the same kind of chest used by the Southern Express Company and generally used by other express companies for such purpose. The numerous cases against express companies have been examined, and the use of such chests we can not find has been alleged as an evidence of a want of care, and respectfully submit that a practice justified by the almost universal experience of express companies, and not not before questioned by their patrons, may be considered as settled in their favor; especially in view of the fact that no evidence was introduced to show that the use of any other chest was practicable, or that there was any negligence in the use of the one in question.

VI.

It is insisted in argument that although the Express Company had limited its liability by special contract, "that it continued to be bound as at common law for any negligence ascribable to the railroad company" over which the messenger was a passenger, and carried the packages.

If this was a correct proposition of law, the plaintiffs would be required to prove affirmatively that there was negligence on the part of the railroad company or its servants. "The burden of proof of negligence was on the plaintiffs to establish the same, not on the defendants to disprove it."

61 *Maine*, 518.

In *Lamb vs. Western Railroad Company*, 7 *Allen*, 98, it was held that in an action against warehousemen for goods lost or stolen from their warehouse, the burden is

upon the plaintiff to prove some neglect or omission of duty by the defendants; and it is not sufficient to prove that their *warehouse was broken open and the goods of the plaintiff stolen*, for this might have occurred when the defendants were in the exercise of the most careful vigilance and oversight. "It was necessary," say the Court, "for the plaintiff to go further and offer some affirmative and *substantive* evidence of carelessness on the part of the defendants." This was the only point involved in the case. The Judge below ruled that the action could not be maintained without more positive evidence of negligence, and without leaving it to the jury to find the negligence from the fact of loss, *directed a verdict* for the defendants. This ruling was affirmed by the full Court.

In *Clark vs. Spence*, 10 *Watts*, 335, the Court say: "When a loss is proved or goods are injured, the law will not intend negligence. The bailee is presumed to have acted according to his trust until the contrary is shown."

See also *Foote vs. Storrs*, 2 *Barb.*, 326.

Newton vs. Pope, 1 *Cowan*, 109.

Harrington vs. Synder, 3 *Barb.*, 380.

That the trestle was broken is not sufficient evidence of the negligence of the railroad company. It was not shown how it was broken, or when, or what caused the break. That it was broken by flood, storm or lightning, or the public enemy, is not negatived by any evidence in the cause. The statement of the witness "that some of the timbers seemed decayed," was not evidence sufficient to warrant a jury in finding that they were decayed, and that this was the cause of the break. The very form of

expression of the witness shows that he did not examine and know that the timbers were decayed. The plaintiffs should have introduced affirmative evidence of the carelessness of the employes of the railroad if they sought to hold these defendants for such negligence.

VII.

If the Railroad or any of its employes were negligent, the plaintiff had its remedy against the Railroad—which occasioned the loss.

New Jersey Steam Navigation Company vs. Merchants' Bank, 6 *Howard*, 382.

VIII.

The relation of master and servant, nor of principal and agent, did not exist between the express messenger and the Railroad Company. He was there passenger with his goods, as any other person was, who purchased a ticket and was passing over the road.

Union Pacific Railroad vs. Nic.
Charles Yoonans vs. the Centra Cos.
Company, 44 *California*.

IX.

RAILROADS ARE NOT SERVANTS OF E

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Union Pacific Railroad vs. Nickols, 8 *Kansas*, 505; *Charles Yoonans vs. the Centra Costa Steam Navigation Company*, 44 *California*.

IX.

RAILROADS ARE NOT SERVANTS OF EXPRESS COMPANIES.

We do not understand learned counsel for plaintiffs in error as disputing, nor could they hope to successfully dispute, that a common carrier may contract for a *just* and *reasonable* limitation of the severe responsibility to which he was holden at the common law. In the case at bar, the defendant made a contract under circumstances excluding all grounds for a doubt or suspicion as to its

entire and absolute good faith, so far as defedant is concerned. The printed forms for the contract had been furnished to plaintiffs' agents, who kept them at their place of business, and who, when they desired to send money by defendant, were in the habit of filling up the blanks in the printed form at their desk in their banking-house, and of sending the contract so prepared (with the money) to the express office for signature. Plaintiffs' agents unquestionably understood that the blank form, when filled up and signed, was a contract, because, when they sent their own money, they always filled up the contract at the end of the form, and paid the larger rate for insurance—that is, when they desired the Express Company to stand responsible as common carriers, *i. e.*, insurers, they paid the fair rate for the risk, and took the memorandum of contract to evidence the understanding between the parties. But, in the case at bar, they had not been instructed to insure, and they therefore purposely made a contract which they knew did not hold the defendant as an insurer. They knew that there was a difference between the contract they made and that which held defendant as an insurer. Under such circumstances will the plaintiffs' agents be heard to say that they did not read the contract they prepared for signature, and that defendant did not call their attention to its contents. [*See printed record, p.* 30].

No fair-minded business man would contend that the plaintiffs' agents were innocently ignorant of the contents of the receipt they took. Every lawyer knows that they were in duty bound to read the paper, and that the ignor-

ance they profess was inexcusable ignorance. It was their duty to read the paper.

Grace vs. Adams, 100 *Massachusetts*, 505.

The case being clear of all ground or pretense that the contract was procured by extortion, duress, fraud, mistake, or haste, the inquiry forces itself upon the legal mind, why then is it not a valid contract? Learned counsel for plaintiffs reply, "Because it seeks to relieve defendants from loss by the neglect of their *agent*, the Railroad Company." Is this a good answer, and, if so, on what principle is it founded? That carriers are not allowed to exonerate themselves from answering for the neglect of themselves or servants, is well settled. But this is not an arbitrary rule enforced by the letter. It is a rule founded on reason and based in good morals. From St. Germain in the Doctor and Student, down to Justice Bradley in Railroad Company *vs.* Lockwood, it is agreed by all courts that the rule is one of policy, and founded on reason. St. Germain said that, if the carrier refused to take articles delivered for carriage, "unless promise were made unto him that he shall not be charged for no misdemeanor that should be in him, the promise were void, for it were against reason and against good manners, and so it is in all other cases like." And this is the leading authority on which Railroad Company *vs.* Lockwood (17 Wallace, 372) is based; and all other cases, whenever the reason of the rule has been looked to or considered, have followed substantially the ground on which St. Germain placed the doctrine, that it would be unreasonable to permit a carrier to contract that he, or agents under his control, should be excused for negli-

gence or fraud. So this court answers the question of why charge the carrier as an insurer? "Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust." * * * "It is obvious, therefore, that, if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the *essential duties* of his employment." (*Railroad vs. Lockwood*, 17 *Wallace*, 377–8).

How do these reasons apply to the case at bar? Why is it against reason and good manners that an Express Company may contract against liability for defective trestle-work on a railroad which the Express Company did not construct, and does not own, and is not bound by any duty to control, or inspect, or repair? Who has said, and who can say, under the testimony in this case, that the Express Company in contracting against loss by fire caused by defective trestle-work on the railroad "put off the essential duties," or any duties "of their employment?" No man can say so unless he also says that it is or must be made the duty of the Express Companies to supervise and repair all railroads over which they carry parcels, and this no man of common intelligence can say.

Express Companies are of modern origin and use. The Courts from analogy have applied to them the rules governing common carriers, but this application should not be carried to unreasonable bounds. Many exceptions to the ancient liabilities of carriers are now allowed under the contract of the parties, because of the new subjects of transportation, and the altered relations be-

tween the carrier and the public he serves (*Railroad vs. Lockwood*, 17 *Wal.*, 380). The express carrier is a new species of carrier in this, that he does not own or control any of the highways, or trains, or boats on or over which he carries. Why then is it unreasonable or against "good manners," or public morals, or policy, that such a carrier may for a less rate of compensation at the option of the shipper or consignor, contract that the latter will take the risk of the safety of the road over which both the contracting parties are equally free from any ownership or control?

We respectfully suggest that the majority of the Court in *Hooper vs. Wells, Fargo & Co.*, 27 *Cal.*, and the Court in the case of *Christensen vs. American Ex. Co.*, 15 *Minn.*, 270, and *Judge Redfield in* 14 *Am. L. Reg*, (*new series*) 39, in his note to Judge Ballard's opinion, and the reviewer of the same opinion in the *American Law Review, January*, 1876, 220, have all failed to keep in view the reason of the rule in question, and have stuck in the letter of the rule. They are misled by convincing themselves that the Railroad Company is the *agent* of the Express Company, and have failed to go back to the reason and principle on which carriers are not allowed to contract against the negligence of their agents. The rule was based on the idea of master and servant, the right to command and the duty to obey, and if an agency in any sense is established, as between an Express Company and the Steamboat or Railroad Company, there is surely a total absence of that relation of master and servant on which rests the maxim "*qui facit per alium, facit per se.*" The doctrine of *Respondeat Seperior* can not

apply because the Express Company is in no proper sense the superior.

The rule established by the Courts that the carrier can not be permitted to contract against the negligence of himself or his agent, had reference to their relation of master and servant, and to no other kind of agency. This we must concede or else show what other kind of agency was contemplated. It can not be insisted that it had reference to the agency of the factor, or the broker, or the auctioneer, or the attorney-at-law, or in fact, or the partner.

The reasons on which the rule was founded apply to the relations of master and servant, and to no agency whatever that contemplates the independent action of the agent in a separate calling. It is against public policy for the carrier to contract against the negligence of his servant, because he controls the servant. Does it therefore follow that it is against public policy for the carrier to contract against the negligence of another carrier whom he does not control? The express company, in the case at bar, had no more control of the construction department of the Louisville & Nashville Railroad Company than had any private carrier for hire who might have been on the same train, or any one of the many passengers on the train. It inevitably follows that the reason founded in policy and common honesty for denying the right to contract against the neglect of the servant ceases to apply to the facts of the case and the reason having ceased the rule ceases. Judge Redfield (in the note supra), we respectfully suggest, does not state the case fairly. The question is not whether ex-

press carriers are by law to be excused from all neglect of railroad and steamboat carriers. As carriers, express companies are insurers. Like all other carriers, they may make reasonable limitations on their liabilities by special contracts fairly made. The questions, and only serious questions, in this case are: Was the contract in question fairly made, and is it reasonable and consistent with good morals? These questions Judge Redfield does not answer. Neither does the writer in the American Law Review give any good and sound answer. It is not sought to change the character of express carriers into that of forwarders only.

But it is confidently maintained that as carriers they may fairly contract for exemption from loss by fire caused by the neglect of other independent carriers, or the unskillfulness of the engineers and building mechanics of a Railroad Company. If they may do this, then all the charges of the Circuit Judge must be sustained and no verdict other than the one rendered could be upheld.

For convenience of reference, and because of its great value as an argument, we append to this brief the opinion of Judge Ballard on the motion for a new trial in the Court below.

Respectfully, G. C. WHARTON,
ISAAC CALDWELL,
Counsel for Defendants.

APPENDIX.

United States Circuit Court. *District of Kentucky.*

BANK OF KENTUCKY *vs.* ADAMS EXPRESS COMPANY

BALLARD, J.—The facts in the case are substantially as follows: The Southern Express Company and the Adams Express Company are engaged each in the business of carrying money and other articles from one part of the country to another for hire, at the request of any one who offers such articles to them for carriage. They do not use in their business any vehicles of their own except such as are required to transport the articles intrusted to them, to and from railroad depots, and to and from steamboat landings. They use railroads, steamboats and the other public conveyances of the country. These conveyances are not subject to their control, but are governed entirely by the companies and persons to whom they belong. The packages intrusted to them are at all times, while on these public conveyances, in the care of one of their own messengers or agents. These companies are engaged in carrying by the railroads, through Louisiana and Mississippi to Humboldt, Tenn., and thence over the Louisville & Nashville Railroad to Louisville, Ky., under a contract by which they divide the compensation in proportion to the distance the article is transported by the respective companies. Between Humboldt, Tenn., and Louisville, Ky., both companies employ the same messenger; but this messenger south of the northern boundary of the State of Tennessee is subject entirely to the orders of the Southern Express Company, and north of that boundary is subject entirely to the orders of the Adams Express Company.

These Express Companies are in the habit of charging one price when they undertake to insure the safe delivery of the articles intrusted to them—that is, when they do not modify their ordinary responsibility as common carriers, and of charging another and lower price when their responsibility is limited. The Louisiana National Bank was aware of these regulations, and had in its possession printed blank receipts, or bills of lading, showing in the body the conditions and exceptions upon which the companies would undertake to carry at the lower rate, and in the margin the printed blank for the rate at which the would insure. Having received a letter from the plaintiff directing the forwarding by express of the sum of $13,528 15, the bank, by its teller, filled the blanks in that part of the bill of lading which contained the conditions and exceptions, and presented it to the Southern Express Company for its signature and delivered the package of money addressed to the plaintiff without stating who was the owner. The bill of lading was signed and redelivered to the teller of the National Bank, and forwarded by him to the plaintiff at Louisville. It does not appear that the receipt was read at the time of its delivery, or that the attention of the officers of the Louisiana National Bank was called specially to the exceptions contained in it, but, as before stated, the bank was aware of these exceptions and of the stipulations for the lesser rate of compensation.

This package was carried by the Southern Express Company from New Orleans to Humboldt, Tenn., and there delivered to the joint messenger of the Southern and Adams Express Companies. While it was in the custody of this messenger between Humboldt and the northern line of the state of Tennessee, the car in which the package was contained was precipitated through a trestle-work on the line of the Louisville & Nashville Railroad, at or near Budd's Creek, and the car and package were destroyed by fire. This was caused by the fallen locomotive, without any fault or neglect on the part of the messenger who had charge of the package.

So much of the receipt as is material to the present controversy is as follows:

"SOUTHERN EXPRESS COMPANY,
Express Forwarders,

"No. 2.—$13,528 15. July 26, 1869.

"Received from the Louisiana National Bank one package, sealed and said to contain $13,528 15, addressed, 'Bank of Kentucky, Louisville, Kentucky.'

"Upon the special occeptance and agreement that this company is to foward the same to its agent nearest or most convenient to destination only, and there deliver the same to other parties to complete the transaction, such delivery to terminate all liability of this company for such damage; and also that this company are not to be liable in any manner, or to any extent, for any loss or damage * * * of such package or of its contents * * * occasioned * * * by fire or steam. The shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and innure to the benefit of each and every company or person, to whom the Southern Express Company may intrust or deliver the above-described property for transportation, and shall define and limit the liability therefor of such other company or person."

Upon these facts the court charged the jury:

First—That the Southern Express Company and the Adams Express Company are common carriers.

Second—That the Adams Express Company is liable for the loss of packages delivered to the joint messenger of the two companies at Humboldt, Tenn., although the loss occur south of the southern boundary of the state of Tennessee.

Third—That if the jury believe the facts above detailed in relation to the execution of the receipt, then it, thus signed and delivered, constitutes the contract, and all the exeeptions in it are a part of the contract, no matter whether each or all of them were known to the Louisiana National Bank or not; and the plaintiff is bound by this contract, whether it expressly authorized the Louisiana National Bank to make it or not.

Fourth—If the bill of lading contained no exception, it is clear that the defendant would not be excused because the accident occurred without its fault. It would be the insurer, and therefore accountable. But the bill of lading, among other exceptions, contained this: "That the company are not to be

liable in any manner, or to any extent, for any loss or damage * * * of such package or its contents * * * occasioned * * * by fire."

"Now, if you believe that the package was destroyed by fire, as above indicated, without any fault or neglect on behalf of the messenger or the defendant, the defendant has brought itself within the terms of the exception, and it is not liable. It is not material to inquire whether the accident resulted from the want of care, or from the negligence of the Louisville & Nashville Railroad and its agents or not, since the uncontroverted testimony shows that the car and train in which the messenger of the Adams Express Company was transporting the package belonged to the Louisville & Nashville Railroad Company, and were exclusively subject to its control and orders. A common carrier who has not limited his responsibility, is undoubtedly responsible for losses, whether occurring on vehicles controlled by himself exclusively, or belonging to and controlled by others, because he is an insurer for the safe delivery of the article which he has agreed to carry; but when he has limited his liability so as to make himself responsible for ordinary care only, and the shipper, to recover against him, is obliged to aver and prove negligence, it must be his negligence or the negligence of his agents, and not the negligence of persons over whom he has no control."

"If in his employment he uses the vehicles of others over which he has no control, and uses reasonable care—that is, such care as ordinarily prudent persons engaged in like business use in selecting the vehicles, and if the loss arises from a cause against which he has stipulated with the shipper—he shall not be liable for the same unless it arises from *his* want of care, or the want of care of his employes.

"Without, therefore, deciding whether or not the evidence adduced in the case tends to establish any want of reasonable or ordinary care on the part of the Louisville & Nashville Railroad Company, I instruct you that such evidence is irrelevant and incompetent, and that you should disregard it—that is, give no more effect to it than if it had not been adduced."

The first and second instructions were not excepted to, but the third and fourth were. At the trial the plaintiff insisted that it was not bound by the terms of the receipt, because it was not shown that the attention of the Louisiana National Bank was called to them at the time, or that it expressly assented to them, but I am of opinion that there was no error in this portion of the charge. The Louisiana National Bank was aware that the receipt contained some exceptions and conditions. It accepted the receipt without remonstrance or objection, and both authority and reason demonstrate that the receipt must under these circumstances be regarded as constituting the contract of the parties: *Dorr* v. *N. J. Steam Navigation Co.*, 1 Kernan 485; *Wells* v. *The Steam Navigation Co.*, 4 Selden 375, and 2 Comstock 204; *Richard Grace* v. *Alvin Adams, &c.*, 100 Mass. 505; *Halford* v. *Adams*, 2 Duer 480; *York Co.* v. *Central R. R.*, 3 Wallace 107.

It is now everywhere admitted that a common carrier may limit his responsibility by express contract, and if he may make an express contract with a shipper of goods, I cannot see why the contract may not be shown by the same evidence which would establish a contract between other parties. I cannot see why a writing delivered by a common carrier to an owner of goods intended by the former to express the terms and conditions of his contract to carry, and received by the latter as such, should not constitute the contract between them.

A common carrier, it is true, is bound to carry all articles within the line of his business upon the terms and conditions imposed by law, if the shipper shall so demand. He has, however, a right to charge in proportion to the risk assumed by him. It is upon this ground the authorities hold, that unless his responsibility is modified by express contract, his undertaking to carry is upon the terms and conditions which are imposed by law. But when he has undertaken to carry at a less rate than he would have a right to charge, and would charge, if he undertook to carry only upon the conditions imposed by law, and has, by his receipt, delivered to the shipper stipulated for a reasonable limitation of his responsibility, and the shipper has accepted

the receipt without objection, the latter is as much bound by the contract thus made as any other party would be.

The correctness of the propositions contained in the remaining portion of the charge to which exception was taken may, I think, be demonstrated in two ways:

First—By the contract between the Bank and the Express Company it was agreed that the company should not be responsible for any loss or damage of the package which should be occasioned by fire. The loss of the pacakage was occasioned by fire; hence the carrier, by the terms of the contract, is not responsible. It is not pretended that the contract was violated by using the cars of the Louisville & Nashville Railroad Company to transport the messenger and the package, or was violated in any other respect. It follows, therefore, that, if the company is liable at all, it is not so by virtue of the contract, but in spite of it.

The contract, however, does not attempt to exempt, nor could it have exempted, the Express Company from loss occasioned by the neglect of itself or its servants, but when it is sought to charge the company with neglect, it must be such neglect as it is responsible for upon the general principles of law.

Now, upon those principles, no one is responsible for damage occasioned by neglect unless it be the neglect of himself, or his servants or agents. But the facts stated show that neither the company nor its servants was guilty of any neglect. It follows that the defendant cannot be charged on this account. Though the defendant used the Louisville & Nashville Railroad to transport its messenger and the package, the railroad company was not, in any legal sense, the servant of the defendant. The defendant had no control over the railroad company or over its servants. The railroad company was no more the servant of the defendant than it is of any passenger whom it transports. It was no more the servant of the defendant than is the hack or cab the servant of him who hires it to transport him from one part of the city to another.

Second—All the authorities agree that when a common car-

rier has, by special contract, limited his responsibility, "he becomes, with reference to that particular transaction, an ordinary bailee—a private carrier for hire," or, "reduces his responsibilities to those of an ordinary bailee for hire:" *York Co.* v. *Central R. R.*, 3 Wallace 107; *N. J. Steam Navigation Co.* v. *Merchants' Bank*, 6 Howard 382; *Railroad Co.* v. *Lockwood*, 17 Wallace 357.

I prefer the latter form of stating the proposition, because it is less misleading. I do not think that a common carrier, by entering into a contract limiting his responsibility, changes his character. He still remains a common carrier, with his responsibility limited in respect to the matter embraced in his contract, to that of an ordinary bailee for hire. The authorities are equally clear that an ordinary bailee for hire is bound to only ordinary diligence, and responsible only for losses and injuries occasioned by negligence or want of ordinary care. The defendant did by special contract limit its responsibility, and neither it, nor its servant, the messenger, is chargeable with any neglect or want of care. The loss of the package was occasioned by fire. The contract provides that the defendant should not be liable for a loss so occasioned, and as neither the defendant nor defendant's servant was wanting in care, it follows that it is not responsible for the loss.

Suppose the package had been lawfully intrusted by the Louisana National Bank to a private person to be carried for hire, and delivered to the plaintiff, and it was contemplated by the parties that such person would transport the package and himself by the railroads, which, it was contemplated, the defendant would use, and the package had been lost under the same circumstances that the package delivered to the defendant was lost, would it for a moment be contended that such private person would be responsible?

Suppose again, that a person should deliver to his friend, who contemplated coming from New Orleans to Louisville by the ordinary modes of travel, a watch, to be carried and delivered at the latter city, and that while such private carrier, without reward, was proceeding on his way in one of the cars of the

Louisville & Nashville Railroad Company, the car should, by the gross carelessness of those having charge of it, be thrown from the track, and the watch in charge of the carrier, without any neglect on his part, destroyed. Is it conceivable that such carrier would be responsible for the loss? To hold that he would be responsible would not only violate the plainest principles of law, but would shock the common sense of mankind, and yet, not only the private carrier for hire, but the private carrier without reward is responsible for the loss of a package intrusted to him, under the circumstances supposed, if the defendant is responsible for the loss of the package claimed in this case.

The private carrier for hire is responsible for losses and injuries occasioned by want of ordinary care on his part or on the part of his servants; and a private carrier without pay is responsible, if not for want of ordinary care, certainly for gross neglect. It can not be maintained with the least show of reason that the Louisville & Nashville Railroad was any more the servant of the defendant in transporting the package sued for in this case than it is the servant of the carrier for hire, and the carrier without hire in the cases supposed, and if these last are not responsible for the neglect of the servants of the railroad company, it is impossible to conceive that the defendant is responsible for such neglect.

The counsel for the plaintiff attempt to escape this conclusion by insisting that, though the defendant limited its responsibility, it still remains a common carrier, and that such carrier is responsible not only for any want of negligence of himself and his servants, but for the negligence of any agency which he may employ in his business.

This proposition is misleading. It is not strictly correct to say that a common carrier is responsible for the negligence of any agency in his business, or even for his own negligence or that of his servants, in the sense in which his responsibility is distinguished from the responsibility of another person. A common carrier is bound to deliver goods intrusted to him, unless prevented by the owner, the act of God, or the public enemy.

He is, as the law terms him, an insurer for the safe carriage and delivery of goods, subject only to the exceptions above mentioned. If he does not deliver goods intrusted to him, he is responsible, not because the goods were lost by his neglect, or the neglect of a servant, or by the neglect of some agency which he employed, but because he insured their delivery. His responsibility is wholly independent of the neglect of any one. If goods delivered to him to be carried are lost while in his or his servants' custody, or while in the custody of some other person who is not his servant, he is equally responsible, not because he is liable upon any principle of law for the negligence of any person who is not his servant, but because he is bound by law to carry and deliver safe all goods delivered to him unless prevented as before stated by the owner, the act of God, or the public enemy. If he has limited his responsibility by special contract, and the loss has been occasioned by the cause excepted in the contract, then the owner in order to charge him must show that though the loss arose directly from the cause excepted, that cause itself was occasioned by the neglect of the carrier. But, when a public or private carrier is sought to be charged with a loss occasioned by his neglect, when neglect is the foundation of the plaintiff's claim, I am not aware that he is liable for any negligence, except upon the same principles, and under the same circumstances, that any other person is liable. I am not aware that he, more than any one else, can be made responsible for the negligence of persons who are not his servants.

Undoubtedly the defendant did, notwithstanding its contract, continue to be a common carrier, but its responsibility was limited to that of an ordinary bailee for hire. Now, an ordinary bailee for hire is responsible for only ordinary care, and liable for the neglect of himself or his own servants, and not for the neglect of persons over whom he has no control. Consequently he is not responsible for a loss occurring under the circumstances presented in this case. If it be admitted that the common carrier has by his contract limited his responsibility to that of an ordinary bailee for hire, then it cannot be consistently insisted upon that he shall be held liable as a common carrier who has

made no express contract. To admit the contract, and to deny any effect to it, is too much for one proposition. The proposition of counsel, reduced to its essence, is simply this: that though the defendant has, by special contract, limited its responsibility to that of a private bailee for hire, it is still responsible as a common carrier. A proposition involving so obvious a contradiction cannot require further exposure.

But obvious as the fallacy and error contained in the cousel's proposition appear to me, the proposition itself seems to be supported by the decision of the Supreme Court of California in the case of *Hooper* v. *Wells, Fargo & Co.*, 27 California 11; by the Supreme Court of Minnesota in the case of *Christenson et al.* v. *American Express Company*, 15 Minnesota Reports 270; and by the learned editor of the American Law Register, in his note to the former case, (Law Register, November, 1865, p. 30).

In the first case the carrier made a contract stipulating that he would not be responsible except as forwarder. The court construed the contract as limiting the responsibility of the carrier to that of a forwarder—that is, of an ordinary bailee for hire—but they held the carriers responsible for a loss occurring on a tug or lighter which plied between the shore and an ocean steamer, occasioned by the negligence of the managers of the tug, although they were not subject to the control or orders of the express company.

In respect to the responsibility of forwarders, the court say: "They are not insurers like carriers, but they are liable for losses of goods while in their custody, resulting from negligence of themselves, and those they employ in their business of forwarders."

The correctness of the first part of this proposition cannot be disputed, nor do I question the correctness of the latter part, if by "those whom they employ in their business of forwarders" the court mean those who are the forwarders' servants, and subject to their control and orders. The court further say, the responsibility of a forwarder is the same as that of a warehouseman, and "if a warehouseman, instead of using his own warehouse, and employing his own subordinates, should, for a

stipulated sum, paid to the owner, use in his business the warehouse of another person, who employs and controls the subordinates, there can be no doubt that he would be liable for a loss of the goods *intrusted to his care*, occurring while in his possession, and resulting from the negligence of such subordinates, although not under his control."

If by the words "intrusted to his care," the court mean to suggests a case where the warehouseman has a contract to keep the goods in his own warehouse, I entirely concur in the proposition stated. But, if they mean that a warehouseman, who violates no contract by removing the goods of his customer from his own warehouse into that of another prudent warehouseman, is responsible for a loss of the goods resulting from the negligence of the subordinates of such other warehouseman, I cannot assent to it.

Suppose a warehouseman's warehouse should be destroyed by fire, it would be his duty to remove such of the goods of his customers as were saved to the warehouse of some other prudent person, and it cannot be insisted that he would be responsible for the loss of goods occurring there, resulting from the negligence of servants of the latter warehouseman.

If a warehouseman contract to keep goods in his own warehouse, and he should remove them—in violation of his contract—to another warehouse, I suppose he would be liable for all losses there occurring, just as a bailee who hires a horse to go to a particular place is responsible for loss or injury to the horse, should he drive or ride him to a different place, and the horse be lost or injured in the prosecution of such other journey.

Again, the court say: "The fact that the defendant made use of various public conveyances, their messenger with the treasure traveling a part of the way by stage, a part by steam-tug and lighters, and a part by ocean steamer, makes no difference as to their liability. For defendants' purposes, the managers of these various conveyances were their agents and employes."

If, as seems to be conceded, it was contemplated by both the plaintiff and defendants that the defendants would not use in their

business their own vehicles, but the conveyances of others, not at all subject to their control or management, and that in the use of those other conveyances the defendants did not violate their contract, I cannot admit that the defendants, who, by the admissions of the court, were liable only as ordinary bailees for hire, were responsible for losses occasioned by the negligence of the managers of those conveyances. I cannot admit that the managers of those other conveyances were, in any legal sense, their agents and employes. The relation of master and servant, principal and agent, does not and cannot exist where the master has no control over the servant, and the principal no control over the agent.

The court further say: "The defendants had the means of holding the proprietors of those various vehicles used in their business of expressmen responsible to them, had they chosen to do so. If they did not take the proper means to secure themselves, it was their own fault."

But I cannot see how any argument can be drawn from this to show that the defendants were responsible. Every bailee or depositary may hold any one responsible for destroying or injuring goods in his possession, but it cannot be maintained that he is responsible for such destruction or injury unless he by his negligence contribute to the same. Besides, the plaintiff had his remedy against the proprietors of those other conveyances, which occasioned the loss [see the *N. J. Steam Navigation Co.* v. *Merchants' Bank*, 6 Howard 382], and it might be retorted "that if he did not take the proper means to secure himself, it was his own fault."

In the Minnesota case it was stipulated that the carrier "was not to be held liable for any loss or damage, except as fowarders only, or for any loss occasioned by the perils of navigation and transportation." The goods were received at New York, and were to be delivered to Christinson & Brother, Mankato, Minnesota. When the goods reached St. Paul, they were placed by the carrier on board the steamboat "Julia," a boat belonging to the Northwestern Union Pacific Company, and managed entirely by its officers and servants, to be transported to Man-

kato. The goods remained in charge of the carrier's messenger. The boat at the time of the accident was strong and in good condition. The carrier was guilty of no want of care in selecting the "Julia" to transport the goods; but on the way the "Julia" was, through the carelessness of its officers and managers, run against a snag and sunk, whereby the goods were damaged.

The court say that the carrier is not exempt from the loss by reason of the stipulation in its bill of lading that "it was not to be held liable for any loss or damage except as forwarders," because, they say: "In our opinion * * * the effect claimed for this clause of the receipt by the defendants is inconsistent with and repugnant to the scope and intent of the result, viewed as a whole, and in connection with the fact showing the defendants' real character and mode of doing business."

In other words, the court held that the defendants were common carriers, and that this clause of their receipt did not modify their liability at all. If the court was correct in this, it is indisputable that this clause did not exempt the carrier from responsibility for the loss claimed.

In respect to the other exception, "perils of navigation and transportation," the court says: "The exception does not excuse the carrier for negligently running into perils of the kind mentioned. The proper construction (of such words) is analogous to that which is put upon the words 'perils of the sea' in bills of lading. While thus it would seem very proper to hold that a snag in one of our western rivers is a peril of navigation, as appears to have been done in Tennessee, if a vessel is wrecked upon one through the negligence of the carrier, or of those whom he employs * * * the carrier is not absolved. Under such circumstances the loss is properly attributed to the agency of man, not to a peril of navigation."

Here again we have the same fallacious and misleading propositions which have been exposed in a former part of this opinion. The sinking of a boat by running on a snag in one of our Western rivers is undoubtedly a "peril of navigation." It is none the less a peril of navigation, though it occur by the fault of the person navigating the boat. It is wholly misleading to say that

it is a peril of navigation when it results from accident and without fault, and that it is not a peril of navigation when it results from negligence. When goods are lost by reason of such peril, occasioned by the negligence of the carrier, the carrier is responsible, not because the goods were not lost by an excepted peril, but because he has brought about the peril through his own carelessness or negligence. He is made responsible for his negligence, not because he is a common carrier, but because he is *guilty* of negligence, and has occasioned loss thereby.

In the books which treat of common carriers, only those carriers are treated of who use their own conveyances, hence it is we often find it stated that the exception, "perils of the sea," or "perils of the river," included in the carrier's bill of lading, does not include losses arrising from what would be generally understood to be "perils of the sea," when occasioned by the negligence of the servants of the carrier. In such case, the carrier being the owner of the vessel, in which the goods are carried, and being responsible for its careful navigation, it is not material in effect whether it is held that a loss arising from an excepted peril, brought about by his negligence, is not a peril of navigation within the meaning of the bill of lading, or that the carrier is responsible for a loss occasioned by the negligence of his servants; but it is better and more correct to place the liability in such case on the latter ground, because to place it on the former is misleading.

Certainly, as the court say: "The exception does not excuse the carrier for negligently running into perils, * * * nor shall he be heard to set up his own negligence to excuse him from responsibility." But, in the case before the court, no negligence was imputed to the carrier. He did not attempt to set up his own negligence to excuse himself from responsibility. He set up that by the contract he was not to be liable for losses arising from the perils of navigation, and he showed that the loss did arise from a peril of navigation, without any fault on his part. He was not responsible for the negligence of the managers of the boat, as I have before shown, because he had no control or authority over them, and as he could be held respon-

sible in the case only for negligence, it would seem he was not liable at all. I think that the court was misled by the definition of "perils of navigation" which it found in the books.

Clearly, that is none the less a "peril of navigation" or a "peril of the sea" because it is attributable to the agency of man. The very case which is generally used to define and explain what is a "peril of the sea" is that of a collision brought about by negligence. If a carrier's vessel should collide on the sea with another vessel, through the fault wholly of the latter, it is everywhere admitted that he would not be responsible for a loss arising from such collision of goods which he was carrying under a bill of lading that exempted him from responsibility for loss arising from "perils of navigation" or "perils of the sea," and yet, undoubtedly, the collision in such case is attributable to the agency—nay, to the negligence—of man.

I have a profound respect for the opinions of the learned courts, which I have here noticed, but I think that they are opposed to the general current of authorities—that they are founded on fallacious and misleading propositions, and that they disregard the well-settled principles of law.

The motion for a new trial is overruled.

U. S. Supreme Court.

THE BANK OF KENTUCKY,

Plaintiff in Error,

VS.

THE ADAMS EXPRESS COMPANY,

Defendant in Error.

THE PLANTERS' NATIONAL BANK,

Plaintiff in Error,

VS.

THE ADAMS EXPRESS COMPANY,

Defendant in Error.

Brief in Behalf of Defendant in Error

CHARLES M. DA COSTA,

CLARENCE A. SEWARD,

Of Counsel for Defendant in Error.

U. S. Supreme Court.

THE BANK OF KENTUCKY,
Plaintiff in Error,

vs.

THE ADAMS EXPRESS COMPANY,
Defendant in Error.

THE PLANTERS' NATIONAL BANK,
Plaintiff in Error,

vs.

THE ADAMS EXPRESS COMPANY,
Defendant in Error.

Brief in Behalf of Defendant in Error.

Statement.

On the 26th of July, 1869, the Louisiana National Bank of New Orleans delivered to the Southern Express Company, at New Orleans, two several packages, alleged to contain respectively the sums of $13,528.15 and $3,000, the former addressed to the plaintiff in error in the first, and latter addressed to the plaintiff in error in the second above entitled action. (Record, fol. 15.) At the time of such delivery by the Louisiana National Bank to the Southern Express Company of the said packages, the paying teller of such bank presented to the agent of the Southern Express Company (Record,

fol. 51) two bills of lading, partly printed and partly written, the written portions being in the hand-writing of the paying teller of said bank.

The agent of the express company thereupon signed such bills of lading, received the packages, and delivered the bills of lading, so tendered for signature, back to the paying teller of the Louisiana National Bank. (Record, fol. 51.) Both the said bills of lading were alike in every respect, saving the description of the contents of the package and the names of the consignees. It is, therefore, only necessary to set forth one of such bills of lading. The following are its terms and figures: (Record, fol. 50.)

" Domestic Bill of Lading.

Southern Express Company.—Express Forwarders.

No. 2. $13,528.15. July 26th, 1869.

Received from La. Nat. Bank one package, sealed, and said to contain thirteen thousand, five hundred and twenty-eight $\frac{15}{0}$ dollars. Addressed, Bank of Kentucky, Louisville, Ky. Freight col.

Upon the special acceptance and agreement that this company is to forward the same to its agent nearest or most convenient to its destination only, and there to deliver the same to other parties to complete the transportation, such delivery to terminate all liability of this company for such package; and, also, that this company are not to be liable in any manner, or to any extent, for any loss, damage, or detention of such package, or of its contents, or of any portion thereof, occasioned by the acts of God, or by any person or persons acting, or claiming to act in any military or other capacity in hostility to the Government of the United States, or occasioned by civil or military authority, or by the acts of any armed or other mob or riotous assembly, piracy, or the dangers incident to a time of war, nor when occasioned by the dangers of railroad transportation, of ocean or river navigation, or by fire or steam. The shipper and owner hereby severally agree, that all stipulations and conditions in this receipt contained, shall extend to and inure to the benefit of each and every company or person to whom the Southern Express Company may entrust the delivery of the above described property for transportation, and shall define

and limit the liability therefor of such other companies or person. In no event is this company to be liable for a greater sum than that above mentioned, nor shall it be liable for any such loss unless the claim therefor shall be made in writing at this office, within thirty days from this date, in a statement to which this receipt shall be annexed.

" Freight Col. For the Company.
" SHACKLEFORD."

Across the left hand end of said bill of lading, was the following printed matter (Record, fol. 51).

" Insured by Southern Express Company for
to only, except
against loss occasioned by the public enemy.
For the Company,
Insurance $."

and this printed matter was not filled up by the teller at the time he delivered the packages to the express company.

The Louisiana National Bank had been in the habit of doing business with the Southern Express Company. It had in its possession blank forms of the bills of lading, and it was its habit when desiring to send a package by said express company, to fill up one of such blank bills of lading, take the package to the office of the Southern Express Company, and at the time of the delivery of the package to the express company, to present such bill of lading, so filled up, for signature to its agent.

The Louisiana National Bank was likewise in the habit of filling up the aforesaid blank, printed across the left hand end of said bill of lading, whenever it desired to insure its packages, that is to say, whenever it desired to contract with the Southern Express Company as a common carrier, under its common-law liability. The officers of such bank were, and for some time previous to the shipment of the packages in question had been fully aware that the rule of the Southern Express Company was to charge higher rates for assuming such unlimited liability, and that, in case such blank was not filled up

the Express Company did not assume such unlimited liability; nor did such Louisiana National Bank ever claim or contemplate such assumption of liability by the express company, unless it fllled up said additional blank and paid the additional rates therefor. (Record, fol. 73.)

Under such state of facts the National Bank of Louisiana shipped the two packages aforesaid and received from the Southern Express Company the two bills of lading, as above referred to. (Record, fol. 16.)

It appeared that the moneys so forwarded by the Louisiana National Bank to the respective plaintiffs in error belonged to such plaintiffs in error respectively, and was forwarded to them at their request to send the same by express. (Record, fol. 42.) The fact of the ownership of the moneys by the respective plaintiffs in error was not known to the Southern Express Company.

The package in question was forwarded from New Orleans on its way as far as Humboldt, Tennessee, by the Southern Express Company, it using for the means of such transportation the usual and ordinary communication by railroads, which it did not own and over which it had no control. (Record, fol. 18.) From Humboldt to Louisville the package was forwarded under the charge of a joint messenger of the Southern and Adams Express Companies to Louisville, by means of the usual railroad communications, which neither the Southern nor the Adams Express Company owned or in any manner controlled. (Record, fol. 34.)

By an arrangement between the two express companies they divided the freight to be earned in proportion to the work performed by each company, (Record, folio 40,) the territory of the Southern Express Company extending to the southern boundary of the State of Kentucky, and that of the Adams Express Company to the north of that. (Record fol. 45.) While in transit between Humboldt and Louisville, over the Louisville and Nashville Railroad, and while going over a trestle at Budd's Creek, on the line and part of such railroad (Budd's Creek being within

the territory of the Southern Express Company), an accident happened, by which the train of cars belonging to and controlled by the said railroad company was precipitated through the trestle and bridge; and about forty-five minutes thereafter a fire occurred by which the car which contained the packages in question was, together with said packages, consumed by fire. (Record, folio 34.)

At the time of the accident the packages were in an iron safe, which is the usual mode of transporting valuable packages used by all the express companies in the United States, and was in charge of the messenger aforesaid. (Record, folio 34.) The messenger by the accident received serious injuries, rendering him unconscious until some time after the destruction of the packages in question by fire. (Record, folio 35.)

Such were the facts which appeared on the trial. No evidence was given by the plaintiffs in error as to the immediate cause of the fire.

The declaration in both cases contained counts upon common law liability of the carriers, as well as a special count upon the agreement or bill of lading hereinbefore referred to, and such latter count admitted the redelivery of the bill of lading, an assent to its terms, and its existence as a contract.

The plea was the general issue, and, by a stipulation, it was agreed that the plaintiff in replication to said plea, and the defendant in defence of said action, might introduce in evidence any matter which might be specially pleaded or applied, the same to have the same effect as if it had been specially set forth by plea, replication, etc. (Record, folio 25.)

Before the Court charged the jury, the plaintiffs in error submitted various requests to charge, as appears by their bill of exceptions, No. 1. (Record, folio 29.) The Court thereupon charged the jury, and declined any instructions asked by the plaintiffs, because it thought all that was correct therein was abstract or embodied in the charge as given. (Record, folio 56.)

The plaintiffs in error excepted generally (Record, fol-56) to the refusals to charge as requested, but did not

call the attention of the Court to any specific request as having been omitted or not included in the charge. The plaintiffs in error likewise took several exceptions to the charge as made, which are set forth in their several bills of exception following their bill of exception, No. 1. (Record, folios 56, 72.)

The jury returned a verdict for the defendant in error.

A motion for a new trial was made and denied. (Record, fol. 75.) The Court below, on so deciding, delivering an opinion which will be found in full in the *American Law Times Reports N. S.*, vol. 1, page 451.

The plaintiffs tendered their Bill of Exceptions, and have sued out their writ of error to this Court to review the proceeding in the Court below. (Record, fol. 76.)

Point I.

After a charge is made, a general exception to the refusal to charge specific requests submitted before the charge was made, is unavailing, unless the attention of the Court is particularly called to the point omitted, especially when the Court have charged some of such requests, either actually or substantially, or when the Court have laid down correctly the general principles of law applicable to the case.

Courts of the United States are not bound to give instructions upon the specific requests by counsel for them. If the Court charged the jury rightfully upon the case, generally it has done all that it ought to do. (Mills *vs.* Smith, 8 Wallace, 27.)

In *Railway Company vs. Whitton* (13 Wallace, 270, 290) this Court said :

"The counsel of the plaintiff has requested three several instructions to the jury, and the counsel for defendant have requested nineteen special instructions. The Court, however, declined to give any of them except

as they were embraced in its charge. Some of the instructions prayed by the defendant presented the law respecting the liability of the Company correctly, and some of them were based upon an assumed condition of things which the evidence did not warrant. But it is not error for the Court to refuse to give an extended series of instructions, even if some of them may be correct in the propositions of law which they present, if the law arising upon the evidence is given by the Court with such fullness as to guide correctly the jury in its findings, as was the case here. Nor is a judgment to be set aside because the charge of the Court may be open to some probable criticisms in particulars considered apart by themselves which could not, when taken with the rest of the charge, have misled a jury of ordinary intelligence."

To the same effect are the rulings in the Court of Appeals of the State of New York in Walsh vs. Kelly (40 N. Y. 556); *Willetts* vs. *Sun Mutual Insurance Company* (45 *N. Y.* 45); *Requa* vs. *City of Rochester* (45 *N. Y.* 129, 137): *Caldwell* vs. *New Jersey Steamboat Company* (47 *N. Y.* 282); *Ayrault* vs. *The Pacific Bank* (47 *N. Y.*, 570); *Newlin* vs. *Lyon* (49 *N. Y.*, 661.)

Whether, therefore, the propositions contained in the requests, were or were not correct, need not be here considered, the more especially as a very cursory reading of the charge as given demonstrates that most of the requests were substantially charged, and almost in the language of the requests. As to those not charged, the questions desired to be thereby raised, are sufficiently presented by the several bills of exception, which contain the exceptions to the charge as made.

Point II.

The questions involved may be stated to be as follows:

1. What, if any, contract was created between the

Southern Express Company and the plaintiffs in error on the delivery of the package and the tendering and execution of the bill of lading under the circumstances in the statement of facts set forth.

2. Did the defendant in error succeed to all the rights, duties and liabilities of the Southern Express Company under the bill of lading.

3. Are the plaintiffs in error bound by the terms of the bill of lading.

4. Is the contract in question, as evidenced by the bill of lading, one which the Courts will recognize and enforce.

5. Was the loss occassioned by any of the exemptions contained in the bill of lading, and

6. If yea, would the defendant in error still be liable if it should appear that the cause, creating such loss, was the result of the negligence of the Louisville and Nashville Company or of its employees, which road was neither owned nor controlled by the defendant in error, or the Southern Express Company, and over whose employees neither the Southern Express Company nor the defendant in error had any power, authority or control.

7. If the defendant in error is so liable, is there any evidence in the case which authorized the submission of the question of negligence to the jury.

Point III.

What, if any, contract was created between the Southern

Express Company and the plaintiff in error on the delivery of the package and the tendering and execution of the bill of lading, under the circumstances in the statement of facts set forth?

The answer to this inquiry is of easy solution.

A. The plaintiffs in error themselves considered that a special contract was thereby created between the Louisiana National Bank and the Southern Express Company, for they so allege and rely upon it in their declaration.

The general rule of law is now well settled that the execution and delivery of a bill of lading by the carrier, and its acceptance by the shipper, without objection at the time of the delivery of the goods into the custody of the carrier, constitutes, in the absence of fraud or mistake, the contract between the parties; and the carrier must be regarded as undertaking and the shipper as agreeing that the goods are to be carried upon the conditions expressed in such bill of lading.

N. J. S. N. Co. *v.* Merchants Bank, (6 Howard, 344).
N. Y. Manufacturing Co., *v.* Illinois Central R. R. Co. (3 Wallace, 107).
Railroad Company *v.* Androscoggin Mills, (22 Wallace, 594).
Dorr *v.* N. J. S. N. Co., (1 Kernan, 485).
Maghee *v.* Camden & Amboy R. R. Co., (45 N. Y. 514, 518).
Lamb *v.* Camden & Amboy R. R. Co., (46 N. Y., 271).
Reed *v* United States Express Company, (48 N. Y., 462.)
Cochran *v.* Dinsmore, (49 N. Y., 246).
Long *v.* N. Y. Central R. R. Co., (50 N. Y. 76).
Belger *v.* Dinsmore, (51 N. Y., 166).
Wetzel *v.* Dinsmore, (54 N. Y., 406).

Collender *v.* Dinsmore (55 N. Y. 200).
Magnin *v.* Dinsmore (56 N. Y., 168).
Steers *v.* L. N. Y. & P. S. S. Co. (57 N. Y., 1).
Gleadel *v.* Thompson (56 N. Y., 194).
Hinkley *v.* N. Y. C. R. R. Co. (56 N. Y., 429).
Westcott *v.* Fargo (61 N. Y., 542).
Magnin *v.* Dinsmore (62 N. Y. 35).
Kirkland *v.* Dinsmore (62 N. Y, 171).
Squire *v.* N. Y. C. R. R. Co. (98 Mass. 239).
Perry *v.* Thompson (98 Mass. 248).
Grace *v.* Adams Express Company (100 Mass., 505).
Pendergast *v.* Adams Express Company (101 Mass., 120).
Hoadley *v.* Northern Transportation Company (115 Mass., 304--6).
Lawrence *v.* N. Y. P. and B. R. R. Co. (36 Conn., 63).
Coleman *v.* United States Express Company (3 Kan., 205).
Olwell *v.* Adams Express Company (Cent. Law Journal, April 16, 1874.)
Oppenheimer *v.* United States Express Company (69 Illinois, 62).
Boorman *v.* American Express Company (21 Wisconsin, 153).
Lewis *v.* Great Western Company (5 H. & N., 67).
Van Toll *v.* S. E. R. R. Co. (12 C. B. N. S., 104 Eng. Com. Law, 73).

B. And whether a shipper chooses or not to read the terms of the bill of lading, is immaterial, as long as he accepts the same at the time of the delivery of the package, and does not dissent from the terms therein contained. He is bound by its terms because he has allowed the carrier

to believe that he assents thereto, and to act upon such belief.

Hopkins *v.* Westcott Express Company (6 Blatchford, 64).
Leitch *v.* the Union R. R. Co. (American Law Times Rep., N. S., vol. 2, page 593).
United States Express Company *v.* Haynes (67 Illinois, 137, 141).
Kirkland *v.* Dinsmore (62 N. Y., 161), and cases there cited.

A similar doctrine has likewise been enunciated in other than carrier cases; in

Rice *v* Dwight Manufacturing Co. (2 Cushing, 87).
Monitor Mutual Insurance Co. *v.* Buffum (115 Mass., 343).
Pinder *v.* Resolute Fire Insurance Co. (47 N. Y. 114).
Bresse *v.* U. S. Telegraph Co. (48 N.Y. 139).
Phillips *v.* Gallant, (62 N. Y., 263, 264).

C. But in the cases at bar the defendant in error need not rely on either of the above well settled propositions of law, for where *the shipper voluntarily prepared a bill of lading containing limitations and exceptions, tendered it to the carrier for acceptance and signature, which the carrier gave, and thereunder received the package for transportation*, it would be very difficult to cite any principle of law, or to refer to any well considered case which supports or enunciates the doctrine that a contract so entered into is not binding on the shipper. Can it possibly lie in the power of a party who prepares an agreement, and tenders it to another for signature and acceptance, and such other signs, accepts and redelivers it, and enters upon its execution, to escape

from such agreement by simply testifying that he had failed to read the same?

It appeared, too, in the case at bar, that the Louisiana Bank well knew that the express company had two modes of receiving valuable packages for transportation, *i. e.*, under an unlimited liability, when they insured against all losses except "losses occasioned by the public enemy," for which they charged a proportionate freight; and another, by which they assumed only certain duties, and were exempted from certain losses and liabilities which they otherwise might have been subject to; and that transportation under such limited liability was undertaken at lesser rates.

The case of *Falkenaur* v *Fargo*, (35 *N. Y. Superior Court Reports*, p. 332), affirmed by the Court of Appeals (55 N. Y. 645), is directly in point. It there appeared that the plaintiff filled up a similar express receipt and presented it to the defendant's Company for signature at the time of the delivery to them of the package. The plaintiffs claimed that they were not bound by the terms of the receipt, but that the defendants were liable to them under their common law liability. The Court, however, (*p.* 336) said:

"This blank receipt was filled up by the plaintiffs at their own office, and the receipt as thus prepared was thereafter, namely, at the time of the delivery of the merchandise for transportation, presented by the plaintiffs to the Express Company for signature. *It therefore constituted a proposition on the part of the plaintiffs for a special contract which was wholly of their own creation, and in the making of which they had not been influenced by any act on the part of the Company.* Now, as every person is presumed to intend that which is the ordinary and natural consequence of his own purposed act, it follows that when the express company assented to such proposal by signing the same and redelivering it to the plaintiffs, the

proposition ripened into a special contract, and as such it became binding upon both parties. In regard to the provisions of that contract, plaintiffs cannot be permitted to plead ignorance."

See also Wallace vs Mathews 39 Georgia 617, 632

We contend, therefore, that the contract between the parties is evidenced and established by the bill of lading so prepared by the Louisiana bank, and by it alone must the duties and liabilities of the parties be determined.

Point IV.

Did the defendants in error succeed to all the rights, duties and liabilities of the Southern Express Company under the bill of lading?

A.—If such bill of lading constituted a contract, then, by its very terms the Southern Express Company were only bound to forward to "their agent nearest or most convenient to destination only," and there were authorized to deliver the same to other parties to complete the transportation. And the contract further provided, "That the shipper and owner hereof severally agree that all the stipulations and conditions in this receipt contained shall extend to and insure to the benefit of each and every company or person to whom the Southern Express Company may entrust the delivery of the above described property for transportation, and shall define and limit the liability thereof or of such other company or person." The language of the bill of lading is so plain that no argument can assist in enforcing it.

B. But even if such stipulation be not contained in a bill of lading, the conditions and limitations therein contained would inure to the

benefit of the connecting carrier, if the contracting carrier had made a through contract.

R. R. Co. *vs.* Androscoggin Mills, (22 Wallace, 594).
R. R. Co. *vs.* Pratt, (22 Wallace, 123).
Bristol & Exeter Railway *vs.* Collins, (7 H. of L. Cases, 194).
Maghee *vs.* C. & A. R. R. Co., (45 N. Y., 514).
Lamb *vs.* C. & A. R. R. Co., (46 N. Y., 271).
Manhattan Oil Co. *vs.* C. & A. R. R. Co., (54 N. Y., 197).

Point V.

Are the plaintiffs in error bound by the terms of the bill of lading?

It is contended by them that as they were not parties to such bill of lading, and as they did not authorize the Louisiana National Bank to enter into any contract on their behalf, save as contained in the direction to send the money by express, they are, therefore, not bound by the terms of the bill of lading. Neither of such contentions is well founded. It is a sufficient answer to say that there was no proof that the defendant in error knew who were the real owners of the money, and so far as they are concerned, the shippers were to be deemed either the owners or the agents of the owners, clothed with full authority to make any contract relating to the transportation thereof.

In *York* v. *C. R. R. Co.*, (3 *Wallace*, 107), the same objection was taken, but Mr. Justice FIELD, in delivering the opinion of this Court, said (p. 113):

"The first of these positions is answered by the fact that it nowhere appears that the agents disclosed their agency when contracting for the transportation of the cotton. So far as the defendant could see, they were themselves the owners."

In *Dorr* v. *N. J. S. N. Co.* (4 *Kernan*, 490), the bill of lading, containing exceptions, was delivered to the carman of the plaintiff, and yet the Court held that it was binding upon the plaintiff, saying (p. 491):

"For the exceptions to the common law liability being made in the bill of lading and delivered to the agent of the plaintiffs must be deemed to have been agreed upon by all parties."

To the same effect was the language of GIBSON, J., in *Griffith* v. *Ingledew* (6 *S. and R.*, 429-437); where that learned judge said:

"Where goods are delivered to a carrier, pursuant to the order of the vendee, who has not himself settled the terms, the vendor, where he makes a special agreement with the carrier without expressly making himself liable, will be considered as having contracted as the agent and in behalf of the vendee."

The decision of the Commission of Appeals of the State of New York in *Nelson* v. *Hudson River R. R. Co.* (48 *N. Y.*, 498), enunciated similar doctrine. Mr. Justice Hunt in delivering the opinion says:

"Kimball & Co. were authorized then to carry this mirror to the starting point of the Hudson River Railroad, and so procure its acceptance by that road for the purpose of being transported to Fulton. This authority must be construed to include all the necessary and usual means for carrying it into effect."

And then the learned Justice stated with approval the rule as laid down by *Redfield* on the *Law* of *Railways*, page 22, to wit:

"As a general rule, the agent to whom the owner en-

trusts the goods for delivery must be regarded as having authority to stipulate for the terms of transportation."

The rule was recognized again, and applied in *Rawson* v. *Holland* (59 *N. Y.*, 617). And to the same effect was the decision in *Squire* v. *the New York Central R. R. Co.* (98 *Mass*, 239), where that learned Court said:

"Even if the drover had no express authority from the plaintiffs to sign any contract relating to their (hogs) transportation, he was the person in charge of the property, and the only one with whom the defendants could make the necessary arrangement, and stood towards them for this purpose in the position of an owner."

But irrespective of the principles deducible from the above cases, the plaintiffs in error are bound by the bill of lading, because it was ratified by them. They adopted it not merely by retaining it after the Louisiana National Bank forwarded it to them, but, by affirmative acts, adopted and ratified it, to wit: they demanded payment from the express company, in the mode, and at the time provided for in the last clause of such bill of lading, and they tendered to the express company the freight due, calculated on the basis of the tariff established by the express company for transportation under such bill of lading (Record, fol. 35.)

Moreover, they have counted on the bill of lading in their declaration, and hence cannot rely on any common law liability of the carrier, for

A. When a special contract is either declared on, or proved, the shipper cannot rely on the common law liability of the carrier.

Mich. Central R. R. Co. *v.* Hale., 6 Mich., 243.

Jefferson M. & I. R. R. Co. *v.* Worland, 50 Ind., 339.

B. If the shipper ignores the contract and sues upon the common law liability, he will, on proo of the special contract, be non-suited.

Latham *v.* Rutley, 1 Law Journal, K. B., 225.
Austin *v.* Manchester R. R. Co., 15 Jurist, 670.
Davidson *v.* Graham, 2 Ohio, N. S., 131.
Ferguson *v.* Cappeau, 6 Harr. & Johnson, 394.
Stump *v.* Hutchinson, 11 Penn., 533.

Point VI.

Is the contract in question, as evidenced by the bill of lading, one which the courts will recognize and enforce.

A. It is difficult to conceive of any principle of law which would sanction a court in saying, that, under the circumstances disclosed in the record, it would not enforce the contract in all its particulars. It was a contract entered into by parties capable of contracting, without any fraud or mistake, or suggestion of fraud or mistake, on either side. It was based on a valid consideration, because the shipper well knew that if the express company assumed an unlimited liability, it would charge a higher proportionate freight; and that if held only to the limited liability expressed in the bill of lading, a less rate of freight would be charged.

With such knowledge on the part of the shipper, and acted on in his previous transactions with the carrier, the shipper prepared the bill of lading and tendered it to the carrier for signature and acceptance. The carrier signed and re-delivered the same, and thereupon entered upon the performance of the contract so created between itself and the shipper. On what principle of law, or on what abstract suggestion of

equity, can the plaintiffs in error, who have succeeded only to the rights of the shipper in this respect, now claim that such a contract should not be enforced by a court of justice?

B. Nor, for the reasons thus stated, can the shipper now and here avail himself of any doctrine that may have been enunciated by the Courts, "that a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law;" or, "that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants."

For in all the cases that have enunciated such doctrines, the fact has invariably existed *that it was the carrier who prepared the bills of lading and tendered* them to the shipper without obtaining the shippers expressed assent to the exemptions from limitations therein contained. The case at bar is totally different from such a case. The carrier here was passive in the creation of the contract. The shipper was the active agent and promoter of the same. He prepared the same in which were inserted stipulations and conditions which he must have known, and which the law conclusively presumes he did know. He knew that the carrier entered into two different contracts with shippers, *i. e.*, for unlimited liability or for limited liability. In the one case the blank at the left hand corner was filled up; in the other case the blank in the left hand corner was not filled up. The shipper had been in the habit of transacting business with the carrier on those terms. In the case at bar the shipper designedly omitted filling up the blank in the left hand corner of the receipt (folio 73 of Record.) He thereby indicated his intentions to enter into a contract with the carrier by which the carrier would assume only the limited liabilities provided for in such bill of lading. And such pre-

sumption from the appearance of the bill of lading is supplemented in this case by the evidence of the shippers themselves that they did not intend to make a contract with the carrier for his general liability (folio 73 of Record.)

By what principle of law or by what theory of public policy can a shipper be inhibited, under such circumstances, from suggesting to and agreeing with an express company on a special contract, by which the latter is relieved from the dangers of railroad transportation or fire, especially when he, as well as the entire public know, that express companies do not own or control the means of transportation, and are bound to employ the usual well-known methods of transportation owned and controlled by others.

The rigorous rules of the common law defining the obligations of carriers grew up at a time when the carrier was the proprietor of the conveyances, and were intended to protect the public against his acts. The changes which the demands of commerce have made necessary by requiring a division of the obligation between the public and the actual carrier by the intervention of an intermediary, will be hereafter considered. But it may be here proper to say, that the rule of law which made it the duty of a carrier to carry whatever was presented for transportation has never yet gone beyond the point of such compulsion under his common law liability. No authority holds that the public has a right to compel the carrier to assume the position of bailee for hire, or with a restricted liability. The carrier, therefore, owes no duty to the public as such bailee for hire, which the public can enforce by compelling him to occupy it. If he does occupy it on request, as in these cases, the occupancy is voluntary, and its obligations are to be interpreted by the contract itself, and not by rules or decisions founded upon the larger liability which knew no limitation

save the act of God and the public enemy. When the carrier is invited to assume the limited liability he has the right to refuse. He violates no public duty by so doing. If he assumes the limited liability the contract of its assumption cannot involve considerations of public policy. No reported case can be found which decides that terms and limitations intelligently devised, and presented by the shipper to the carrier for acceptance, violates rules of public policy which the law has laid down for the general government of common law relations between shippers and carriers. Those rules were for the benefit of shippers. Their violation by carriers was repressed from motives of public policy. No case decides that a class of persons for whose benefit a certain rule of law has been prescribed may not waive such rule; and such waiver when acted upon estops the party assenting from claiming the application of the general rule. When such waiver takes the form of a stipulation, intelligently prepared by the shipper, assented to and acted upon by the carrier, it would be in violation of every known principle of law to permit such stipulation to be retracted, and to allow the shipper to enforce the rigid common law rule which he had intelligently waived.

C. But even if this court should, under the circumstances of the case, hold that the above rules as so enunciated are applicable to the case at the bar, the inquiry arises :

(1) Whether there is anything "not just and reasonable in the eye of the law" contained in said bill of lading? or,

(2) Whether the bill of lading pretends to exempt "from responsibility for the negligence of himself" [the express company] "or his servants"?

The second inquiry is easily answered. For by the terms of the bill of lading, the express company does not claim "exemption from the responsibility for the negligence of himself" [the carrier] "or his servants," unless this Court should hold, that under the term "his servants" are iucluded servants and agents not employed by it, not under its control, and the independent employment of whom was in contemplation of both of the parties at the time of making the contract,—a point which will be hereafter more fully considered.

Now the answer to the first inquiry is easy. Most of the exemptions contained in the bill of lading, are such as either the law would imply, or are so clearly reasonable and just, that argument concerning the same is unnecessary. The only debatable ones may be said to be the exemptions from loss, "when occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or steam." And as the package in question was destroyed by either the dangers of railroad transportation, or by fire, the discussion resolves itself into a consideration of those two exemptions.

A common carrier is responsible at common law for loss or damage occasioned by dangers of railroad transportation, or by fire. That must be conceded. That, a shipper is presumed to know, as well as, that for such liability the carrier is entitled to be paid a reasonable compensation. The shipper likewise knows the fact that the carrier will, and does carry goods for a cheaper rate, provided the damage or loss caused by the dangers of railroad transportation or by fire be exempted. With such knowledge he deliberately enters into a contract with the carrier, based on such reduced rate of compensation, and exempts the carrier from those specified risks, and assumes the risks *quoad hæc* himself. Where is the immorality or illegality of such a

contract, especially in the case where the shipper knew that over the means of transportation and the agents of the same, the carrier had no control or authority.

We must assume, therefore, that this Court will, under the circumstances of the case, recognize and enforce all the stipulations, exemptions and conditions contained in the bill of lading.

Point VII.

Was the loss occasioned by any of the exemptions contained in the bill of lading, and if yes, are the defendants in error nevertheless liable therefor?

The loss was either occasioned by the dangers of railroad transportation or by fire. The Court below seemed to take the view that the package in question was destroyed by fire, the result of the accident on the railroad, by which the trestle work was broken and the train precipitated through the trestle work. It charged that it was immaterial to inquire whether the accident resulted from the want of care or from the negligence of the railroad company and its agents or not. Whether such charge was correct will depend upon the consideration of the following suggestions, to wit:

(1) Assuming that the loss occurred by reason of one of the exempted provisions, was the plaintiff in error entitled to go to the jury on the question of negligence, that is to say, on the question of whether or not the accident had occurred by the negligence of the railroad company or its employees, which concededly was not owned or controlled, and were not employed or governed, or in the slightest way under the orders of either the Southern Express Company or the Adams Express Company? And

(2) If they were so liable, was there any evidence in the case warranting such submission to the jury.

These two propositions must be considered separately.

I. If we admit that a common carrier cannot lawfully stipulate for exemption from responsibility for the negligence of himself or his agents, it by no means follows that an express company is liable for the negligence of agents not employed by it, over whom it has no control, nor for their negligence in operating or maintaining a road which it neither owns nor controls, but which it must use in the reasonable performance of its duty,—all known to the shipper, and therefore forming part of the contract entered into. It seems unjust, upon abstract principle of justice, that any one should be responsible for the neglect or the fault of another whom he must employ, whom it is known that he must employ, and over whom he has no control or authority whatever. The whole doctrine of *respondeat superior* is based on the theory that the principal is liable for the acts of the agent because he is under the principal's control, and so being, acts for him. In Blake *vs.* Ferris (5 N. Y., 48, 54), the Court, in speaking of such maxim, said, "it is founded on the power which the superior has a right to exercise, and which for the prevention of injuries to their persons he is bound to exercise over the acts of his subordinates. *Therefore, the rule cannot be applicable to cases where no such power exists.*" An apt illustration is the well-known principle, that if A contracts with B to build for him a house, and A has the whole management of the building thereof, and an accident happens, caused by the negligence of A's workmen, B is not responsible. No authorities are needed at this day to be cited in support of this principle.

How can it be said that such doctrine shall not be applicable to express companies? Express companies are not what are technically known and considered in the books as common carriers. They are more in the nature of middlemen. The strict rules applicable to common carriers cannot in the nature of, nor ought they in the reason of the thing, to be applied to them. The doctrines relating to common carriers, derived as they are from the early English times of stage-coaching, and when every carrier owned his own means of conveyance, and employed and controlled his servants, cannot be applied to the express men —that class of middle-men known so extensively in this country, and known to the public who employ them, not to be the owners of means of transportation, but whose duty it therefore is to, and who do employ for the purpose of transportation the well known and established means of communication. They are employed by the public for additional safety and convenience,— for the convenience, in that they are in the habit of taking small parcels and of calling for them at stores or residences, and delivering them to the consignee, at his designated place of abode or business; for additional safety, in that they are in the habit of using additional safe-guards against robbery in the transportation of valuables, to wit: by the use of iron safes with special messengers accompanying the same. Companies of this kind (as the defendants in error are) are responsible for their and their servants' wrongful and negligent acts in the performance of their special and own duties; they ought not, and it is respectfully submitted, are not, responsible for the acts of persons over whom they have no control, nor for, to them, unknown or unseen defects in modes of transportation, which they do not own or control, but which they are bound to employ.

But if we concede for the sake of the argument that a carrier can no longer exempt himself from the result of his negligence [the modern authorities having properly exploded the once attempted distinction between negligence and gross negligence. *R. R. Co.* v. *Lockwood*, (17 *Wallace* 382), *et seq. Milwaukee R. R. Co.* v. *Arms*, (1 *Otto*, 493.), the inquiry still arises, what is the meaning of the word "negligence," from which the law inhibits the carrier from exempting himself·

The definition given by this court in the case of 17 *Wallace*, *supra*, was, "all negligence, whatever epithet we give it, *is failure to bestow the care and skill which the situation demands.*" In the case in 1 *Otto*, *supra*, this court again defined it, saying, "But after all *it means the absence of the care which was necessary under the circumstances.*" In such last case this court cites, with approval, the definition of negligence of Mr. Justice WILLES, in *Grill* v. *The General Iron Screw Collier Co.*, *Law Rep.* 1 *C. P.*, 612, subsequently affirmed in the *Exchequer Chamber Law Rep.*, (3 *C. P.*, 476,) which was, "It is really *the absence of such care as it was the duty of the defendant to use.*" And the recent philosophic writer, Amos, on the "*Science of Law*," defines negligence to be "*A disregard of the rights of others.*"

Now, within all those definitions can an express carrier, known as such to the public, who are fully aware of the fact that it does not own or control either the modes of transportation or the agents employed therein, and whose duty it is to employ such means of transportation, be said to be guilty of negligence when, in the course of transportation over such roads, a package entrusted to

its care, is lost or destroyed by a railroad accident, occuring by the negligence of the employees of such railroad, or from a defect in its equipments or road bed, and which defect was totally unknown to and unseen by such express carrier? Where on his part, to use the language of this court in 17 *Wallace, supra*, "is the failure to bestow the care and skill which the situation demands."? Where on his part, to use again the language of this court, in 1 *Otto, supra*, is, "the absence of the care that was necessary under the circumstances."? Where, on his part, in the language of Mr. Justice Willes, is "the absence of such care as it was the duty of the defendant to use?', Where, on his part, in the language of Amos, is "the disregard of the rights of others?"

The care and duty referred to in the definitions of the word "negligence" by this Court and by Mr. Justice Willes, consist in the care of the express carrier in his selecting and forwarding the package by the best known means of transportation, as he is not, and is to the public known not to be, the owner or controller of means of transportation. Such care and duty the defendant in error fully bestowed.

Where, again, in the language of the definition given by AMOS, was "the disregard of the rights of others?" The evidence shows an absolute regard of the shippers' rights, by the employment by the express carrier of the well known and usual means of transportation. There were no other rights to regard in that connection; for it never could have been in contemplation of the parties that the shippers under the contract to *forward*, as made by the bill of lading, would have a right to enforce a liability against the express carrier for the negligent acts or to

him unknown improper equipment of the railroads, which he was in duty bound to use, when over such agents and roads the carrier had no authority or right of control, and whose want of authority and right to control was at the time of making of the contract well known to both parties.

(See the opinion of the Court below, reported in the *American Law Times Reports, N. S.*, vol. 1, page 451, and where the adverse authorities, which may be cited against us, are carefully and justly criticised.)

The distinction between the liability of common carriers, as such, and Express Companies, as forwarders, was again clearly stated by Mr. Justice Sharswood in *American Express Company* vs. *Second National Bank* (69 *Penn. State Rep.*, 394, 402). "It is very well settled," said that learned Justice, "that forwarders are not insurers as common carriers. They are liable only as ordinary bailees to carry for hire. "A person," says Mr. Justice Story, "who receives and forwards goods, taking upon himself the expenses of transportation, for which he receives a compensation from the owners, and who has no concern in the vessels or wagons by which they are transported, and no interest in the freight, is not to be deemed a common carrier, but a mere warehouseman or agent." (*Story on Bailments, Sec.* 502. *Chitty on Carriers*, 18. *Hoop* vs. *Wells*, (5 *Am. Law Reg., N. S.* 16.) *Jenneson* v. *Camden & Amboy R. R. Co.* (4 *American Law Reg.*, 234). *Camden & Amboy Railroad Compny* v. *Forsyth* (11 *P. F. Smith*, 81)."

See also the article entitled "*Express Companies* as *Common Carriers*," in *Law Register, vol.* 5, *N. S.* [*Old Series, vol.* 14], page 449, and the article entitled "*How far*

are Express Companies liable?" same volume, page 648.

And even if an Express Company should be regarded as a common carrier, it is yet settled law that a common carrier may by express contract exempt himself from liability for loss happening without his fault.

Hoadley v. *Northern Transportation Company*, (115 *Mass.*, 304).

Virginia & Tennessee R. R. C. v. *Sayers*, *American Law Register*, *N. S.*, volume 15, page 297.)

VIII.

There is but one remaining point to be considered, and that is, if the defendants in error are to be held liable, notwithstanding the exemptions contained in the bill of lading, on the theory that the package was lost by the negligence of the employees of the Railroad Company or the want of proper equipments therein, then the question arises (a), what was the cause of the loss? And (b), was there any proof, as against the defendants in error, showing such negligence?

A. The proximate cause of the destruction of the package was fire. This was one of the exemptions contained in the bill of lading. The fire occurred forty-five minutes after the train had broken through the trestle (Record, fol. 65, 66). There was not a scintilla of proof that the fire was caused by, or the immediate result of, the breaking through the trestle. On the contrary, it appears (folio 65, 66) that the fire did not occur until forty-five minutes thereafter. We say, then, that the fire was the proximate cause of the loss, and that the doctrine of *causa proxima non remota spectatur* applies. This Court, in *Insurance Company*

v. *Tweed* (7 *Wallace* 44, 52,) said, "One of the most valuable of the criteria furnished by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote." Applying this doctrine to the case at bar, it appears that fire, "a new force," had intervened, of itself sufficient to stand as the cause of the misfortune; and hence it, and not the remote one taking place prior thereto, must be considered as the cause. If that be so, then there was not a scintilla of proof showing that the fire was caused by any negligence.

The onus of proving negligence lies on the shipper the moment the carrier brings himself within any of the exemptions of the contract. It can hardly be seriously suggested that the carrier, the moment he proves facts showing that the loss occurred by reason of one of the exempted perils, is still bound to prove affirmatively, that such peril did not arise by reason of his negligence.

This Court, in *Railroad Company* v. *Reeves*, (10 *Wallace* 176, 190,) said, in speaking of a common carrier who had proved a loss as resulting from one of the exempted clauses in the bill of lading,

> "What is to make him liable after this? No question of his negligence arises until it is made by the other party. It is not necessary for him to prove that the cause was such as releases him, and then to prove affirmatively that he did not contribute to it. If, after he has excused himself by showing the presence of the overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely upon it."

If additional authority be needed, reference may be made to what this Court said in *N. J. S.*

N. Co. v. *Merchants'-Bank* (6 *Howard*, 384); *Clark* v. *Barnwell* (12 *Howard*, 280); *Transportation Company* v. *Downer* (11 *Wallace*, 129).

Also to

The Neptune (6 Blatchford, 193).

Merriman *v.* brig "Mary Queen" (1 Newb., 164).

Hunt *v.* Cleveland (1 Ibid, 221).

The propeller "Rocket" (1 Bissell, 354).

Ship "Delhi" (4 Benedict, 345, 7).

Goldey *v.* The Pennsylvania R. R. Co. (30 Penn., 246).

Farnham *v.* The Camden and Amboy R. R. Co. (55 Penn., 53, 61).

Colton *v.* Cleveland and Pittsburg R. R. Co. (67 Penn., 211).

Sager *v.* Portsmouth S. & P. & E. R. R. Co. (31 Maine, 228).

Mann *v.* Birchard (40 Vermont, 337).

Lawrence *v.* The N. Y. P. & B. R. R. Co. (36 Conn., 63, 75).

Coleman *v.* The United States Express Co. (3 Kansas, 305).

New Orleans, &c., Insurance Co. *v.* The New Orleans R. R. Co. (20 La. Ann., 302).

Benkard *v.* B. & O. R. R. Co. (34 Md., 197).

Lamb v. Camden and Amboy R. R. Co. (46 N. Y., 271).

Cochran v. Dinsmore (49 N. Y., 249).

The plaintiff's exception to the charge (Record, folio 62,) was only to that portion of the charge in which the Court instructed the jury that it was not material to inquire whether the accident resulted from want of care or from negligence of the Louisville and Nashville Railroad Company and its agents or not. That exception was not well taken; because on the evidence as it stood it would have been improper (even assuming that the defendants in error would be liable for such negligence,) to have submitted the question of

negligence to the jury, because there was not a scintilla of evidence introduced by the plaintiff in error to support such contention.

The only other cause of the disaster, (and which we claim to be the *causa remota* and not the *causa proxima*,) was the giving way of the trestle. All the evidence on that subject is contained in the Bill of Exceptions No. 4 (Record, folio 68 *et seq.*) The plaintiff's only testimony on that subject was given by a person who was not an expert, and who arrived about nine or ten hours after the accident and after the fire. He testified that "some of the timbers on the south end of the trestle *seemed* decayed; I mean at the south end of the break." As against that, the defendants introduced in evidence testimony showing the proper construction of the bridge and trestle work; that it had been carefully inspected a couple of weeks before the accident; and likewise that the accident probably occurred by a latent defect in an axle, which defect could not have been discovered by external examination; the cars thus going off the track, and then going through the trestle work. It would have been error on this state of facts for the Court even to have submitted the question to the jury whether or not the accident had been caused by the negligence on the part of the railroad company or its employees For, had the jury, on such evidence, found for the plaintiff, it would have been the duty of the Court, on a motion, to have set aside the verdict as against evidence, and that is always the true test of whether or not a question should have been submitted to the jury.

Besides which the law is now well settled that, in every case, the question is not whether there is any evidence, but whether there is any evidence upon which the jury can properly proceed to find a verdict for the party producing it, and upon whom the onus of proof is imposed.

Improvement Co. *vs.* Mason, 14 Wallace, 442, 448.
Pleasants *vs.* Fant, 22 Wallace, 120, 121.
Goblin *vs.* McMillan, Law Rep. 2 P. C. 317, 335.
Crofter *vs.* The Met. Railway Co., Law Rep. 1, C. P., 300.
Baulec *vs.* N. Y. & H. R. R. Co., 59 N. Y., 366.

Nor can the plaintiff in error derive any aid from the suggestion that there are a class of cases in which negligence will be presumed; that is to say, in actions for personal injuries against railroad companies where the accident has occurred by reason of some defect in its equipment, the law will presume negligence on the part of the railroad company unless rebutted. That doctrine is applicable solely to actions by persons against the carriers controlling and owning the road and its equipment, and when the action is upon the common-law liability of the carrier. It has no applicability when the suit is against the carrier who neither owns nor controls the road or its equipment, and was ignorant of any defect therein; nor when such suit is against a carrier upon a contract limiting his liability, and the cause of the accident is within one of the exemptions. For in all such cases the burden of proof to establish negligence is upon the passenger or shipper, and will not be presumed. (See 10 *Wall* 190; 6 *How.* 384; 12 *Howard* 280; 11 *Wallace* 129, and other cases *s. p. a.*)

Point IX.

The contention by the plaintiffs in error that the defendants were likewise guilty of negligence in not having

a fire-proof safe, is sufficiently answered by the principles deducible from the foregoing points. They were not insurers, but forwarders, or carriers under limited liability, and they were liable, hence, only for the exercise of ordinary care and precaution, and for the exercise of their duty in the premises, which as to this, consisted in adopting the usual and well known means of transportation and safety. It was in proof that all the express companies were in the habit of using such safes for the transportation of their money and other valuable packages, and that the use of fire-proof safes was not merely more dangerous so far as burglary was concerned, but was likewise, by reason of their great weight, impracticable in the use of express business, requiring, as it does, quick handling in order to avail themselves of railroad transportation and its connections. (Record, folio 66.)

Point X.

The judgments appealed from should be affirmed, with costs.

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October, 1876.